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No. 87-_____

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

AKZO N.V., ENKA B.V., ARAMIDE MAATSCHAPPIJ v.o.f.,
and AKZONA INCORPORATED,

Petitioners,

—v.—

U.S. INTERNATIONAL TRADE COMMISSION and
E.I. Du PONT de NEMOURS and COMPANY,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

Of Counsel:

DAVID R. HYDE
LAURENCE T. SORKIN
80 Pine Street
New York, New York 10005

C. FREDERICK LEYDIG
LEYDIG, VOIT & MAYER
One IBM Plaza, Suite 4600
Chicago, Illinois 60611

DENIS MCINERNEY
CAHILL GORDON & REINDEL
80 Pine Street
New York, New York 10005
(212) 701-3000

*Counsel of Record
for Petitioners*

March 20, 1987

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QUESTIONS PRESENTED

1. Whether the U.S. International Trade Commission ("ITC") violates fundamental due process rights when, in adjudicatory proceedings prosecuted by private complainants under Section 337 of the Tariff Act ("Section 337"), the defending parties are *routinely* (a) excluded from access to the complainants' evidence against them, (b) barred from the hearing room, and denied their right to assist their counsel, when the complainants' witnesses testify, and (c) not permitted to see significant portions of the complaint, and even the decision, against them.

2. Whether the adjudication by the ITC of patent, antitrust and other issues between private parties in Section 337 proceedings is an unlawful exercise of traditional judicial authority in violation of Article III of the Constitution.

3. Whether the ITC's procedures in Section 337 cases fail to accord foreign nationals and their imported goods "national treatment" as required by the General Agreement on Tariffs and Trade and the Treaty of Friendship, Commerce and Navigation with the Netherlands.

Statement Pursuant to Rule 28.1

Petitioners Enka B.V. and Akzona Incorporated (now Akzo America, Inc.) are wholly owned subsidiaries of petitioner Akzo N.V. Other subsidiaries or affiliates of Akzo required to be listed under Rule 28.1 are Enka A.G., an entity organized under the laws of the Federal Republic of Germany; La Seda de Barcelona, an entity organized under the laws of Spain; Astral S.A., an entity organized under the laws of France; and Blundell-Permoglaze Holdings PLC, an entity organized under the laws of the United Kingdom.

Petitioner Aramide Maatschappij v.o.f. is a partnership organized under the laws of The Netherlands; its partners are Enka Aramide B.V., a subsidiary of Enka B.V., and Noramide B.V., a subsidiary of N.V. Noordelijke Ontwikkelingsmaatschappij, a development agency of the Dutch government.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
STATEMENT PURSUANT TO RULE 28.1	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY APPENDIX	2
STATEMENT OF THE CASE	2
A. Commencement of Commission Proceedings...	3
B. The ITC "Protective Order" and Requests to Modify It	4
C. The ALJ and ITC Decisions	9
D. The Court of Appeals' Decision	10
REASONS FOR GRANTING THE WRIT	11
I. THE DECISION BELOW VIOLATES DUE PROCESS, CONFLICTS WITH PRINCIPLES UNIFORMLY HELD BY THIS AND OTHER COURTS, AND DISREGARDS CLEAR CON- GRESSIONAL INTENT	14
II. ONLY AN ARTICLE III COURT MAY ADJU- DICATE THE PATENT AND OTHER MAT- TERS DECIDED BY THE ITC HERE	22

III. SECTION 337, AS INTERPRETED IN THE DECISION BELOW, FAILS TO ACCORD "NATIONAL TREATMENT" TO FOREIGN NATIONALS AND FOREIGN GOODS IN VIO- LATION OF U.S. TREATY OBLIGATIONS....	26
---	----

CONCLUSION	29
------------------	----

TABLE OF AUTHORITIES

Cases:	PAGE
<i>Abourezk v. Reagan</i> , 785 F.2d 1043 (D.C. Cir.), <i>cert. granted</i> , 107 S. Ct. 666 (1986).....	19
<i>Brown & Williamson Tobacco Corp. v. FTC</i> , 710 F.2d 1165 (6th Cir. 1983), <i>cert. denied</i> , 465 U.S. 1100 (1984)	14n
<i>Commodity Futures Trading Commission v. Schor</i> , 106 S. Ct. 3245 (1986).....	13, 24-26
<i>In re Continental Illinois Securities Litigation</i> , 732 F.2d 1302 (7th Cir. 1984)	21n
<i>Corning Glass Works v. United States International Trade Commission</i> , 799 F.2d 1559 (Fed. Cir. 1986)...	28n
<i>Crowell v. Benson</i> , 285 U.S. 22 (1932)	24-25
<i>Doe v. District of Columbia</i> , 697 F.2d 1115 (D.C. Cir. 1983).....	20
<i>Frischer & Co. v. Bakelite Corp.</i> , 39 F.2d 247 (C.C.P.A.), <i>cert. denied</i> , 282 U.S. 852 (1930)	20, 22
<i>Globe Newspaper Co. v. Superior Court</i> , 457 U.S. 596 (1982)	14n
<i>Greene v. McElroy</i> , 360 U.S. 474 (1959).....	19
<i>Helminski v. Ayerst Laboratories</i> , 766 F.2d 208 (6th Cir.), <i>cert. denied</i> , 106 S. Ct. 386 (1985).....	19-20
<i>ICC v. Louisville & Nashville R.R.</i> , 227 U.S. 88 (1913)	18n
<i>Joy v. North</i> , 692 F.2d 880 (2d Cir. 1982), <i>cert. denied</i> , 460 U.S. 1051 (1983)	21
<i>Morgan v. United States</i> , 304 U.S. 1 (1938).....	17n
<i>Northern Pipeline Construction Co. v. Marathon Pipe Line Co.</i> , 458 U.S. 50 (1982).....	23, 24

	PAGE
<i>Norwegian Nitrogen Products Co. v. United States</i> , 288 U.S. 294 (1933).....	20
<i>Ohio Bell Telephone Co. v. Public Utilities Commission</i> , 301 U.S. 292 (1937).....	18-19
<i>Press-Enterprise Co. v. Superior Court</i> , 464 U.S. 501 (1984).....	14n
<i>Richmond Newspapers, Inc. v. Virginia</i> , 448 U.S. 555 (1980).....	22
<i>In re San Juan Star Co.</i> , 662 F.2d 108 (1st Cir. 1981) ..	19
<i>Sumitomo Shoji America, Inc. v. Avagliano</i> , 457 U.S. 176 (1982).....	27n
<i>Union Manufacturing Co. v. Han Baek Trading Co.</i> , 763 F.2d 42 (2d Cir. 1985).....	28n
<i>United States v. Will</i> , 449 U.S. 200 (1980).....	22
<i>United States ex rel. Toth v. Quarles</i> , 350 U.S. 11 (1955)	23
<i>Wilson v. American Motors Corp.</i> , 759 F.2d 1568 (11th Cir. 1985).....	21n
<i>Wong Yang Sung v. McGrath</i> , 339 U.S. 33 (1950)	18n
Administrative Decisions:	
Certain Rotary Wheel Printers, 5 I.T.R.D. (BNA) 1933 (ITC 1983).....	6, 10, 12, 20-21, 21n
H.P. Hood & Sons, Inc., 58 F.T.C. 1184 (1961).....	16n
Spring Assemblies and Components Thereof, Inv. No. 337-TA-88, 216 U.S.P.Q. 225 (ITC 1981), <i>aff'd on other grounds sub nom. General Motors Corp. v. United States International Trade Commission</i> , 687 F.2d 476 (C.C.P.A. 1982), <i>cert. denied</i> , 459 U.S. 1105 (1983).....	28

International Decisions:

- United States—Imports of Certain Automotive Spring Assemblies*, GATT BISD, 30th Supp. (May 26, 1983) 29n

Congressional Documents:

- Attorney General's Comm. on Administrative Procedure, *Administrative Procedure in Government Agencies*, S. Doc. No. 8, 77th Cong., 1st Sess. (1941) 16n
- Intellectual Property and Trade: Hearings Before Subcomm. on Courts, Civil Liberties, and Administration of Justice of House Comm. on Judiciary*, 99th Cong. 2d Sess. (1986)25n, 29n
- President's Message to Congress on Trade Reform Act of 1973*, in House Comm. on Ways and Means, *Materials on Administration Proposal Entitled "Trade Reform Act of 1973"*, 93d Cong., 1st Sess. (Comm. Print 1973)..... 17n
- S. Rep. No. 1298, 93d Cong. 2d Sess. (1974), *reprinted in 1974 U.S. Code Cong. & Admin. News* 718612, 17n

Constitutional Provision:

- U.S. Const. art. III and amend. V*passim*

Rules and Regulations:

- Federal Trade Commission Regulation, 16 C.F.R. § 3.45(a)..... 16n
- Fed. R. Civ. P. 26(c) 21n
- Fed. R. Evid. 615..... 16-17
- International Trade Commission Regulations
- 19 C.F.R. § 210.30..... 10n
- 19 C.F.R. § 210.31..... 10n
- 19 C.F.R. § 210.35..... 10n

19 C.F.R. § 210.36	10n
19 C.F.R. § 210.44(a)	5

Statutes:**Administrative Procedure Act**

5 U.S.C. § 555(b) (1982)	12, 17-18
5 U.S.C. § 556(e) (1982)	12, 17-18

Judicial Code

28 U.S.C. § 1254(1) (1982)	2
28 U.S.C. § 1295(a)(6) (1982)	10n

Sherman Act §§ 1 *et seq.*,

15 U.S.C. §§ 1 <i>et seq.</i> (1982)	23n
--	-----

Tariff Act

§ 333, 19 U.S.C. § 1333 (1982)	10n
§ 337, 19 U.S.C. § 1337 (1982 & Supp. III 1985) <i>passim</i>	
§§ 701-771, 19 U.S.C. §§ 1671-1677 (1982 & Supp. III 1985)	21

Treaties and International Agreements:

General Agreement on Tariffs and Trade, Oct. 30, 1947, 4 Bevans 639, 61 Stat. 5, T.I.A.S. No. 1700	26-27
---	-------

Treaties of Friendship, Commerce and Navigation

Nov. 4, 1946, United States-Republic of China, 63 Stat. 1299, T.I.A.S. No. 1871	27n
Feb. 2, 1948, United States-Italy, 63 Stat. 2255, T.I.A.S. No. 1965	27n
Jan. 21, 1950, United States-Ireland, 1 U.S.T. 785, T.I.A.S. No. 2155	27n
Aug. 3, 1951, United States-Greece, 5 U.S.T. 1829, T.I.A.S. No. 3057	27n
Aug. 23, 1951, United States-Israel, 5 U.S.T. 550, T.I.A.S. No. 2948	27n

	PAGE
Oct. 1, 1951, United States-Denmark, 12 U.S.T. 908, T.I.A.S. No. 4797	27n
April 2, 1953, United States-Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863	27n
Oct. 29, 1954, United States-Federal Republic of Ger- many, 7 U.S.T. 1839, T.I.A.S. No. 3593	27n
March 27, 1956, United States-Netherlands, 8 U.S.T. 2043, T.I.A.S. No. 3942	27, 27n
Nov. 28, 1956, United States-Korea, 8 U.S.T. 2217, T.I.A.S. No. 3947	27n
Nov. 12, 1959, United States-Pakistan, 12 U.S.T. 110, T.I.A.S. No. 4683	27n
Treatises:	
1 E. Lipscomb, <i>Walker on Patents</i> (3d ed. 1984)	23
Other Authorities:	
Advisory Comm. Note to Fed. R. Evid. 615	17
Comments of U.S. Regarding European Communities' Investigation of Exclusion from U.S. Market of Aramid Fibers Produced by Akzo N.V. or Its Affili- ates	24n
Minutes of GATT Council Meeting, GATT Doc., C/M/ 161 (Oct. 29, 1982)	29n

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OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit (“CAFC”) affirming the ITC’s exclusion order is reported at 808 F.2d 1471 (Fed. Cir. 1986) and is set forth as Appendix A. The relevant decisions of the Administrative Law Judge (“ALJ”), denying petitioners’ requests for access to the evidence against them, are unreported and are reproduced in Appendix B.¹

¹ The ALJ’s post-hearing “Business Confidential Initial Determination” was issued on May 9, 1985. The ITC refused to review any of the issues here presented, and affirmed the ALJ’s determination that there was a violation of Section 337 in a decision dated July 15, 1985; the ITC’s decision on the exclusion order is dated November 25, 1985. These deci-

JURISDICTION

The CAFC decision was issued on December 22, 1986. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1982).

STATUTORY APPENDIX

The relevant constitutional and treaty provisions, statutes and regulations are reproduced in Appendix C.

STATEMENT OF THE CASE

Respondent U.S. International Trade Commission (which until 1974 was known as the Tariff Commission) is an administrative agency that has responsibility for adjudicating alleged violations of Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337 (1982 and Supp. III 1985). That section prohibits "unfair methods of competition and unfair acts in the importation of articles into the United States . . . the effect or tendency of which is to destroy or substantially injure [a U.S.] industry".² The six ITC Commissioners are appointed by the President for terms of nine years; only one of them is a lawyer. Apart from Section 337 cases, the ITC functions principally as an investigative body reporting to Congress and the President with respect to trade and tariff matters.

sions are reported as *In the Matter of Certain Aramid Fiber*, Inv. No. 337-TA-194, U.S.I.T.C. Publication 1824 [Parts 1 and 2 of 2]. Copies of both the public and confidential versions of these decisions (which do not discuss any of the issues raised here) are being lodged with the Clerk of the Court.

2 Among other things, "unfair acts" include the importing of foreign products made by a method which, if practiced here, would infringe a U.S. process patent. 19 U.S.C. § 1337(a).

Respondent E.I. DuPont de Nemours & Co. ("DuPont"), the complainant below, is the world's largest chemical company and producer of aramid fibers (which it sells under the trademark "Kevlar").³ Petitioners Akzo N.V., a Dutch corporation, and related entities, are the only other source of aramid fibers.⁴ In the proceedings below, the ITC found that Akzo's manufacture of aramid fibers abroad was covered by a valid DuPont U.S. process patent, and entered an *in rem* exclusion order prohibiting their importation into the U.S. by anyone not licensed by DuPont—thus assuring DuPont a 100% monopoly of this market. The ITC did so on the basis of a trial by *proxy* in which Akzo's outside counsel and those assisting them were permitted to participate but petitioners (including their inside counsel) were denied access to the evidence and the hearing room whenever DuPont requested confidentiality.

A. Commencement of Commission Proceedings

The proceedings below were initiated and orchestrated by DuPont as a new front in a global patent war involving over a dozen countries. On April 18, 1984, without notice to Akzo, DuPont filed a Section 337 complaint with the ITC alleging that Akzo was importing aramid fibers manufactured in the Netherlands by a process which infringed DuPont's Blades (or

³ Aramid is a remarkable synthetic fiber that is five times stronger than steel on an equal weight basis and has extraordinary heat and stretch resistance qualities. It has a wide range of uses, such as in aircraft mainframes, bullet-proof vests, cables and tires; in pulp form aramids are superior to asbestos for use in brake linings, gaskets and other automotive friction materials.

⁴ Petitioner Enka B.V. is Europe's largest producer of industrial fibers. Petitioner Aramide Maatschappij v.o.f. is a partnership which manufactures aramid fibers; it is owned 50% by Enka B.V. and 50% by a development agency of the Dutch government. Petitioner Akzona Incorporated (now Akzo America Inc.) is an American subsidiary of Akzo N.V. For convenience petitioners are sometimes referred to collectively as "Akzo".

'756) process patent.⁵ The complaint concluded that this was an "unfair method of competition" the tendency and effect of which was "to destroy or substantially injure" DuPont's U.S. aramid fiber business (JA 47).⁶

A few weeks later, the ITC adopted DuPont's complaint and assigned an ALJ to hear the case, which was formally commenced by a notice in the Federal Register on May 23, 1984. Akzo's answer asserted, among other things, that DuPont's patent was anticipated by prior art and that Akzo could not substantially injure DuPont by the relatively small amount of sales it might hope to make in the U.S.; it also raised several affirmative defenses on patent, antitrust and equitable grounds (JA 166-170).

Although the ITC was represented by Commission staff counsel in the proceedings below, the case was actually prosecuted by dozens of lawyers representing DuPont assisted by scores of DuPont executives, experts, paralegals, and clerical personnel. ITC counsel took no position on the validity of DuPont's patent, made no document requests, served no interrogatories, noticed no depositions, called no witnesses, and introduced only one exhibit—one which DuPont's counsel had inadvertently failed to offer.

⁵ Well before the ITC proceeding had been commenced (and before investing more than \$300 million on research and development in the aramid fiber field), Akzo tried to obtain a declaratory judgment that DuPont's aramid fiber patents (including the Blades '756 patent) were invalid. On DuPont's motion Akzo's first complaint was dismissed for lack of a "case or controversy" when Akzo was operating only a pilot plant. *Enka B. V. v. E.I. Du Pont de Nemours & Co.*, 519 F. Supp. 356 (D. Del. 1981). After Akzo had commenced construction of a commercial facility, it filed a similar suit, in which its attack on the Blades process patent was dismissed for lack of subject matter jurisdiction because Akzo did not practice the process in the United States. *Akzona Inc. v. E.I. Du Pont de Nemours & Co.*, 607 F. Supp. 227 (D. Del. 1984).

⁶ "JA" citations refer to the Confidential Joint Appendix filed with the Court of Appeals for the Federal Circuit.

B. The ITC "Protective Order" and Requests to Modify It

On May 21, 1984, two days before notice of the proceeding was published in the Federal Register, the ALJ (without any showing of need by DuPont or notice to Akzo) *sua sponte* issued a standard ITC "protective order". This order permanently limits access to any information which the producing party labels "confidential" to the adversary's outside counsel and outside experts or assistants. Petitioners could not even see the "confidential version" or key portions of *the complaint itself*, and their outside counsel could see them only after agreeing to be bound by the terms of the protective order, which provided:

"Any information . . . which is *asserted* by a supplier to contain or constitute confidential business information shall be so designated by such supplier. . . . Such information whether submitted in writing or in oral testimony shall be disclosed at any hearing only *in camera* before the Commission or [ALJ]." ("Order No. 2", App. B, 34a, ¶ 2, emphasis added).

Both the standard order itself (App. B, 34a, ¶¶ 2, 3) and the Commission's rules, (App. C, 69a; 19 C.F.R. § 210.44(a) (1986)), make it clear that in ITC parlance "*in camera*" means to be kept secret not only from the public, but also from the *parties* and their in-house counsel *throughout* the proceeding. Thus, these petitioners and their in-house counsel were barred by an *ex parte* order from knowing the testimony and exhibits introduced against them during the trial whenever DuPont so desired.

At various times before and during the hearing, Akzo objected to this procedure and suggested a number of modifications. It first asked the ALJ to conform his order to a protective order which had previously been entered in the pending Delaware action (*see* fn.5) involving the same patent and many of the documents DuPont stamped confidential in

the ITC case (JA 199-203).⁷ Alternatively, Akzo moved to permit specific Akzo in-house attorneys to know the evidence on their agreement to be bound by the protective order against further disclosure.⁸ Akzo's requests were denied by the ALJ on July 6, 1984 (Order No. 7; App. B, 40a-46a), solely on the basis of *Certain Rotary Wheel Printers*, 5 I.T.R.D. (BNA) 1933, 1937 (ITC 1983). There the ITC ruled that in-house counsel for a respondent could not have access to material marked "confidential" unless the respondent could prove that access was essential in order to present its defense.

During discovery, hundreds of thousands of pages of documents (including a map of the Netherlands and newspaper clippings), as well as thousands of pages of deposition testimony by DuPont witnesses, were indiscriminately stamped "confidential" by DuPont. In January 1985 the parties were required to designate the documents that they intended to offer as exhibits at trial the following month. DuPont again claimed "confidentiality" for nearly all of its exhibits and other evidence—including its written witness statements which, under ITC rules, constitute the direct testimony (so that the only "live" testimony consists of the cross-examination and redirect examination of the witness).⁹

⁷ The Delaware district court's stipulated protective order provided for access to pre-trial discovery by Akzo's and DuPont's in-house counsel, and in certain instances other representatives of the parties; it did not restrict access to trial evidence in any way (JA 183-195).

⁸ One of these in-house counsel was an adjunct judge of a Dutch court and president of the European Lawyers' Association; another was the chairman of the disciplinary committee of the European Patent Bar. Both were signatories to the Delaware district court protective order that gave them access to similar "DuPont confidential" data there (JA 201).

⁹ ITC proceedings under Section 337 are compressed because they are required by statute to be completed within one year from the date of publication of the Notice of Investigation in the Federal Register (or, in cases such as this one that are designated "more complicated", within 18 months). 19 U.S.C. § 1337(b)(1). As a result, discovery must ordinarily be completed within four months, and only two weeks are allowed for the hearing even in "more complicated cases" in order to give the ALJ and thereafter the ITC sufficient time to fulfill their functions within the statutory period.

After trying unsuccessfully to persuade DuPont to declassify its testimony and exhibits, Akzo again moved, just prior to trial, to modify the order to at least permit *one* of Akzo's in-house counsel and *one* specified management representative to know the evidence that DuPont was offering against Akzo at the hearing (again after agreeing to be bound by the protective order, and with DuPont having reciprocal access to Akzo's evidence) (JA 595-602).

The ALJ repeatedly stated that he and the other administrative law judges were "troubled" by the Commission's procedures on protective orders.¹⁰ Nevertheless, he admitted 80% of DuPont's evidence (including its most crucial documents and testimony) while Akzo's in-house counsel and executives were excluded from the hearing room.¹¹ When they were allowed in, they were sent out again whenever DuPont's counsel raised his hand. They were barred when DuPont's researcher (Dr. Blades) testified as to his alleged invention, and when DuPont's witnesses testified as to "substantial injury" based on DuPont's past sales and its salesmen's predictions of Akzo's future conduct. They were not even allowed to be present when Akzo's own economic expert (Dean Paul W. MacAvoy of the University of Rochester Graduate School of Management) testified, because his testimony commented on DuPont's data.

¹⁰ At the February 15, 1985 Prehearing Conference, the ALJ stated during argument of Akzo's motion: "I am troubled when we have a due process right here I have only been here since April, so that doesn't give me much experience with respect to these protective orders. We have been very much troubled by them. I know the Judges have. We have discussed it informally, and there is a feeling that parties are overdoing it, and I made reference to that earlier this week" (JA 19069).

¹¹ DuPont designated as confidential all or part of 793 (or 79%) of its 999 exhibits and petitioners were excluded from the hearing room during live testimony consisting of 1,870 pages (or 80%) of the total of 2,343 pages of testimony given by DuPont's witnesses. Thus far, DuPont has challenged these figures only on the ground that it later "declassified" some of this material.

At the urging of the ALJ, DuPont “declassified” much of the patent testimony after the witness had been excused and, in some cases, after the hearing was concluded.¹² To this date, however, *all* the critical economic evidence on which the ALJ relied to find “substantial injury to a domestic industry”, as required by Section 337, and the ALJ’s findings of fact and the portions of his opinion based on that evidence, remain sealed. They are known to petitioners’ outside counsel, but not to petitioners or the public at large.

DuPont was never required to substantiate its claims of confidentiality, which the ALJ refused to review.¹³ Moreover, the fact that DuPont declassified most of its patent evidence *after* the event demonstrates that the initial claim of confidentiality as to this evidence was simply unfounded. The economic or “injury” evidence—which is still under seal—was based primarily on predictions by DuPont salesmen of future U.S. aramid sales and prices in some twenty different “end use” categories, under four different scenarios (*i.e.*, with and without an ITC exclusion order, each with and without DuPont responding to Akzo’s threatened competition).¹⁴ Many of these

¹² The opinion below erroneously describes this declassification after the event in stating that “the court understands that all information relating to patent validity and enforceability . . . was promptly made fully available to all” (App. A, 20a).

¹³ The ALJ had his own doubts about this procedure, but felt constrained by the ITC’s policy:

“And I have seen some instances where I just feel that it is going overboard. . . . And because of the Commission policy with respect to confidentiality, I let it go by. . . . I can read it through, but I would have reluctance saying, well I think this is non-confidential.” (JA 19026)

¹⁴ In brief, DuPont’s salesmen estimated that, even with Akzo in the U.S. market, DuPont would retain over 95% of U.S. sales, and would triple or quadruple its profits from aramid fibers, between 1986 and 1990 (when

were prepared at the request of DuPont's counsel or expert witness for the purpose of generating "evidence" of injury in this litigation and were initially claimed by DuPont to be work product (JA 21465). The only witness who testified as to the supposed confidentiality of DuPont's evidence conceded that he could think of no competitive harm to DuPont if certain portions of these forecasts were disclosed to Akzo (JA 19971-72), but insisted that "anything that is helpful to Akzo would be harmful to DuPont" (JA 19976).

On February 21, 1985, two days before the close of the hearing and after DuPont had rested its case, the ALJ denied Akzo's application to modify the protective order (Order No. 40; App. B, 47a-56a), on the ground that petitioners had not proven that it was absolutely necessary for them to have access to the evidence against them to adequately present a defense.

C. The ALJ and ITC Decisions

On May 9, 1985, the ALJ issued his "Business Confidential Initial Determination," holding that DuPont's patent was not invalid and had been infringed and that, while Akzo's imports had not injured DuPont as alleged, they would have a "tendency to substantially injure" DuPont in the future. The ITC refused to consider any of Akzo's objections, except as to one patent validity issue, and issued an exclusion order prohibiting the importation of Akzo's aramid fiber unless licensed by DuPont (JA 1144-47). In the absence of a Presidential veto, the ITC's order became final on January 25, 1986.

the DuPont patent expires) (JA 3145-54; 18396-426). However, they predicted that they would do even better if they faced no competition at all, due to an ITC exclusion order, and DuPont continued the vigorous marketing and research program it had adopted in response to Akzo's threat to enter the U.S. On that basis the ALJ found future substantial injury to DuPont.

D. The Court of Appeals' Decision

The CAFC held that the ITC's determinations were supported by "substantial evidence" and affirmed.¹⁵ It rejected Akzo's contention that the ITC had "effectively deprived it of its rights to confrontation, to rebuttal, and to effective assistance of counsel" because access to the evidence "was freely available to outside counsel although they were not free to show or repeat it to Akzo's management or in-house counsel" (App. A, 17a).¹⁶

Akzo's opening brief to the CAFC had cited cases in this Court and others confirming a party's right, in any adjudicatory proceeding, to know the evidence offered against it, to be present in the courtroom, and to assist in its own defense. It challenged the appellees to produce a single case to the contrary in any jurisdiction other than the ITC, and they failed to do so; instead (as Akzo's brief had anticipated), they could only cite decisions limiting access to pretrial discovery on good cause shown. None of these cases denied access to the evidence offered at trial. The CAFC, however, expressly refused to "stop to examine" the inapplicability of those decisions to evidentiary hearings (App. A, 21a). Ignoring this Court's cited opinions, the CAFC relied instead on the ITC's *Rotary Wheel Printers* decision noted above, and on "the practice in our own court, that records in appeals to us are frequently classified in large part" (App. A, 21a)—presumably referring to appeals from Section 337 proceedings. Thus the court below broadly endorsed the ITC's practice of imposing on a respondent

¹⁵ The CAFC has exclusive jurisdiction over ITC determinations in Section 337 cases under 28 U.S.C. § 1295(a)(6) and 19 U.S.C. § 1337(c).

¹⁶ The court further stated that the "primary justification" for the ITC's procedures is that disclosure of "sensitive materials to an adversary would undoubtedly have a chilling effect" on the willingness of a party to provide such information to the ITC (App. A, 19a). While that is at best dubious, the ITC, of course, has compulsory subpoena powers, 19 U.S.C. § 1333; 19 C.F.R. § 210.35, which are particularly effective with respect to the parties themselves. Discovery may be obtained from both parties and non-parties, 19 C.F.R. §§ 210.30, 210.31, under penalty of sanctions, 19 C.F.R. § 210.36.

seeking access to the evidence against it the impossible burden of proving that it is "absolutely necessary" for it to know the evidence it is not allowed to see (App. A, 18a).

The decision also rejected Akzo's contentions that the ITC's procedures violate Article III and U.S. treaty obligations.

REASONS FOR GRANTING THE WRIT

Each of the questions presented is worthy of review by this Court.

The first question raises important and recurring issues of fundamental due process. As domestic businesses have become more aware of the powerful anticompetitive weapon Section 337 provides, while at the same time permitting no relief to the foreign respondent, these ITC proceedings are becoming more and more common.¹⁷ If the singular view of due process embraced by the Court of Appeals is allowed to stand, it will prejudice the basic rights of future litigants before the ITC (and perhaps other administrative tribunals as well) in a manner detrimental to competition at home and to the image of our judicial system abroad.

The court below recognized that it was sanctioning "the extreme and internationally provocative remedy contemplated [by § 337]—exclusion of imports from particular countries" (App. A, 24a). It did so on the basis of a trial by proxy, in which the petitioners were not permitted to know and confront the evidence against them, to be present at their hearing, and to assist counsel in their own defense. Even in the CAFC, large portions of the record on appeal were kept secret from the petitioners—so that to this date they do not know the basis for key elements of the exclusion order against them. These procedures, admittedly *routine* in ITC adjudicative hearings and in their re-

¹⁷ Since the 1974 amendments to the Tariff Act, 261 such proceedings have been commenced, almost one-third of them in the last three years.

view by the CAFC, clearly violate due process. Indeed, they more closely resemble the infamous Star Chamber proceedings than the "full 'due process' hearing" Congress intended when it expressly made Section 337 proceedings subject to the adjudicatory hearing provisions of the Administrative Procedure Act (S. Rep. No. 1298, 93d Cong., 2d Sess. 195 (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News 7186, 7328). The APA provides that "[a] party is entitled to appear *in person* or by or with counsel" and that the "transcript of testimony and exhibits . . . shall be made available to the parties" (5 U.S.C. §§ 555(b) and 556(e), *emphasis added*). Petitioners were deprived of each of these rights whenever their adversary incanted the magic word "confidential", which it did with respect to some 80% of the evidence it introduced.

The CAFC justified this result by relying on the ITC's *Rotary Wheel Printers* ruling that a "confidentiality" classification by an adversary can only be overcome by a showing that it is "absolutely necessary" for the respondent to know the evidence against it in order to put in a defense (App. A, 20a). As Akzo asserted (without contradiction) in the court below, that burden has never been met to the ITC's satisfaction—and we confidently predict that it never will be, absent action by this Court.

Under the CAFC's Kafkaesque interpretation of the APA and due process, respondents before *any* administrative tribunal may be deprived of substantial rights on the basis of evidence they have never seen, introduced at a "hearing" from which they were excluded—so long as they were represented by outside counsel who was given access to the evidence and the hearing room. Thus the decision below has far-reaching implications for all those subject to agency adjudications.

The second question is whether the patent and other issues decided by the ITC, in a proceeding brought and prosecuted by a private party claiming rights traditionally

decided by a district court, should have been tried by an Article III court. We submit that they should under the criteria stated in *Commodity Futures Trading Commission v. Schor*, 106 S. Ct. 3245 (1986), for discerning Congressional encroachment upon the territory which Article III reserves to the federal judiciary. The CAFC ignored those criteria and summarily rejected petitioners' argument by pronouncing ITC proceedings "public" in nature—the very analysis rejected months earlier in *Schor*.

The final question is whether the ITC's exclusion of parties and other Section 337 procedures (which are not mandated by statute) violate U.S. treaty obligations by subjecting foreign nationals and their goods to "non-national" treatment. In view of the concern already evidenced by the European Community about this issue, its prompt resolution by this Court may resolve the controversy presently pitting the U.S. against its European allies and trading partners.¹⁸

Each of these important issues is ripe for review now. Because of the CAFC's exclusive jurisdiction over ITC appeals, that agency's extreme position on due process rights can only be corrected by this Court's review of the CAFC's endorsement of the ITC's procedures. As demonstrated in Point I below, this case clearly exposes the CAFC's fundamentally flawed philosophy of due process, and it thus presents this Court with a rare opportunity to exercise its supervisory power to prevent injustice in this and subsequent cases. On the other hand, if this Court should fail to consider the issues presented by this petition, there is a real danger that the CAFC's view of due process

¹⁸ On July 25, 1985, the Commission of the European Communities submitted a *note verbale* to the Department of State protesting the ITC's procedures in this case as a "discrimination" under the GATT. In doing so, the EEC referred to its previously expressed concerns about Section 337 proceedings in its 1984 *note verbale* commenting on ITC procedural rules and in its 1982 notification to GATT that Section 337 procedures constitute an illicit "non-tariff barrier".

will spread to spawn more mischief in other agency proceedings. For these and other reasons stated more fully below, petitioners respectfully pray that the writ be issued.

I.

THE DECISION BELOW VIOLATES DUE PROCESS, CONFLICTS WITH PRINCIPLES UNIFORMLY HELD BY THIS AND OTHER COURTS, AND DISREGARDS CLEAR CONGRESSIONAL INTENT

The CAFC's decision conflicts with all prior court precedents, which uniformly hold that a party defending himself in an adjudicatory hearing may not be deprived of his rights to confrontation, to access to the evidence against him, and to assist counsel in his own defense. Indeed, absent the most extraordinary showing, the evidence relied upon by the trier of fact may not be withheld even from the public at large.¹⁹ In stark contrast, the decision below imposes on the party accused the Sisyphean burden of showing that it is "absolutely necessary" for him to know the evidence which he does not know simply because his adversary has stamped it confidential.

The court below's insensitivity to the requirements of due process is apparent from the following key portion of its opinion:

" . . . it is *obvious* that that confidential information—relating to DuPont's business, activities, plans and expectations—should not be made available (unless, perhaps, where absolutely necessary for a fair hearing) to a direct competitor like Akzo. That such full access was not

¹⁹ Judicial proceedings are "presumptively open". *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 505 (1984). *Accord Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603-05 (1982). The presumption of openness applies equally to administrative proceedings. *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1180 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984).

absolutely necessary to appellants' making of their own case is shown by the crucial fact that Akzo was at all times perfectly free to offer its *own* market projections as well as to reveal its *own* activities, forecasts, and interpretations. *Both* sides could present to the Commission their own information on those matters *without knowing those of the other side's*" (App. A, 20a, emphasis added).

To begin with, denying a party access to evidence "relating to [the adversary's] business, activities, plans and expectations" cloaks in secrecy virtually all of the evidence in a commercial case—as in fact happened here. There is nothing "obvious" about this result; instead, all other federal and state courts, and all other administrative tribunals, consistently require this very information, when offered in evidence, to be made available—and not only to the other side, but to the *public* as well.

The CAFC's assumption that the accused need not know the accuser's case because he can present rebuttal or alibi evidence without knowing it is a *non-sequitur*. As a justification for refusing to let the defendant know the evidence against it in a case concerning a nascent industry, as to which only the complainant and the defendant were knowledgeable (since no one else in the world had produced and marketed aramid fibers), the CAFC's reasoning borders on the bizarre.

The court's further suggestion that this result is justified because *both* sides were litigating in the dark (App. A, 20a, 22a) ignores the disparity between the position of a party defending itself blindfolded and that of an attacking complainant (against whom no relief may be had under ITC practice). DuPont's lead counsel recognized this disparity when he described Akzo's offer to make mutual disclosure of all evidence "a mouse for an elephant trade". In this context, the CAFC's conclusion that there was no "discriminatory treatment" here (App. A, 22a) is reminiscent of Anatole France's observation:

"The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges . . ." *Le Lys Rouge* ch. 7 (1894).

Absent waiver, a litigant has an absolute right under the Fifth Amendment to know the evidence arrayed against it, to be present in the hearing room, and to assist in his own defense.²⁰ Apart from the CAFC decision below, and the single ITC precedent it relies on, the parties have been unable to find any holding in any jurisdiction to the contrary. In fact, other courts and administrative tribunals deal (often on an expedited basis, as in tender offer cases) with the very same kinds of information to which these petitioners were denied access without keeping it from either the public or the parties.²¹

In federal courts, the right to be present is recognized by Rule 615 of the Federal Rules of Evidence, which permits the exclusion of witnesses but "does not authorize exclusion of (1) a party who is a natural person, or (2) an officer, or employee

20 There can be no genuine issue of waiver here. Instead of finding any waiver by Akzo, as DuPont had argued, the opinion below noted at least three occasions on which Akzo vigorously protested the "protective order" (App. A, 16-17a). It stated that Akzo did not follow the declassification procedures of paragraph 10 of that order (App. A, 18-19a), but those procedures were simply to request access from the producing party before submitting the issue to the ALJ (App. B, 37a, ¶ 10). Akzo in fact did so, and DuPont's counsel stated on the record that there was no possibility of an agreement and the issue would have to be decided by the ALJ (JA 21373).

21 For example, the Federal Trade Commission, like the ITC, adjudicates unfair acts in commerce based on business data such as that kept secret here. Its hearings are generally *public*; when they are held *in camera* (meaning *non-public*, *not ex parte* as at the ITC) it is only on the basis of a strong showing that prejudice would otherwise result. *H. P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1189 (1961). The FTC's rules provide that even in the case of *in camera* treatment, documents introduced in evidence must be disclosed to respondents and their counsel, 16 C.F.R. § 3.45(a). As the Attorney General's Committee on Administrative Procedure noted, open hearings are "an effective guarantee against arbitrary methods in the conduct of hearings. Star Chamber methods cannot thrive where hearings are open to the scrutiny of all." Attorney General's Committee on Administrative Procedure, *Administrative Procedure in Government Agencies*, S. Doc. No. 8, 77th Cong., 1st Sess. 68 (1941).

of a party which is not a natural person designated as its representative by its attorney." As stated by the Advisory Committee:

"Exclusion of persons who are parties would raise serious problems of confrontation and due process. Under accepted practice they are not subject to exclusion. 6 Wigmore § 1841. . . . As the equivalent of the right of a natural-person party to be present, a party which is not a natural person is entitled to have a representative present."

In the ITC it is the Administrative Procedure Act ("APA"), rather than Rule 615, that governs. The 1974 amendments to Section 337 of the Tariff Act, which transformed Section 337 proceedings from investigations into on the record adjudicatory hearings, provided for due notice and "a hearing in conformity with the provisions of [the APA]," 19 U.S.C. § 1337(c). The legislative history shows nothing less than a "full 'due process' hearing" was contemplated.²² Moreover, the

22 "[Section 337] determinations . . . would be required to be made by the Commission on the record after notice and opportunity for a full hearing in conformity with the provisions of [the APA]. The full hearing required would be a *full 'due process' hearing*, with the Commission of course being able to impose reasonable restraints on the time to be devoted to such hearings." S. Rep. No. 1298, 93d Cong., 2d Sess. 195 (1974), *reprinted in* 1974 U.S. Code Cong. & Ad. News 7186, 7328 (emphasis added).

"The bill would also amend the current statute concerning patent infringement by subjecting cases involving imports to *judicial proceedings similar to those which involve domestic infringement*" *President's Message to Congress on the Trade Reform Act of 1973*, in House Comm. on Ways and Means, *Materials on Administration Proposal Entitled "Trade Reform Act of 1973,"* 93d Cong., 1st Sess. 5, 12 (Comm. Print 1973) (emphasis added).

Even before the enactment of the APA, this Court held that, when Congress required a "full hearing" by an agency, it intended to afford "those fundamental requirements of fairness which are the essence of due process in a proceeding of a judicial nature." *Morgan v. United States*, 304 U.S. 1, 19;

APA expressly provides that a “party is entitled to appear *in person or by or with counsel*” 5 U.S.C. 555(b) (emphasis added), and that the “transcript of testimony and exhibits . . . constitutes the exclusive record in accordance with section 557 of this title and . . . *shall be made available to the parties*”, 5 U.S.C. § 556(e) (emphasis added).

In the court below, DuPont of necessity argued that the APA is satisfied if a party is permitted to appear *either* in person *or* by counsel and that the “choice” of counsel could be imposed on respondent by a complainant claiming confidentiality—and the CAFC, *sub silentio*, agreed. To so handcuff the defense at the request of an adversary would violate due process in any case, but it was particularly prejudicial in a case such as this involving a new industry. Petitioners’ outside counsel and those assisting them were forced to defend this case without being permitted to discuss the key evidence against Akzo with any knowledgeable source.²³

As Justice Cardozo wrote for this Court in *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 292, 300 (1937):

“The company protested. It asked disclosure of the documents indicative of price trends, and an opportunity to examine them, to analyze them, to explain and to rebut them. The response was a curt refusal. Upon the strength of these unknown documents refunds have been ordered for sums mounting into millions, the Commission report-

ICC v. Louisville & Nashville R.R., 227 U.S. 88, 91-94 (1913). The APA provisions for adjudicatory proceedings codify traditional due process standards. *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950).

²³ For example, DuPont’s proof of the essential “substantial injury” requirement was based entirely on its sales force’s forecasts of aramid fiber sales and prices in over a dozen different end-use market segments, year-by-year through 1990 (JA 21073-76). As petitioners’ counsel advised the ALJ (to no avail) unless Akzo could see and analyze those detailed forecasts it could not effectively rebut them (JA 21424).

ing its conclusion, but not the underlying proofs. The putative debtor does not know the proofs today. This is not the fair hearing essential to due process. It is condemnation without trial."

Citing *Ohio Bell* and other precedents, this Court wrote in *Greene v. McElroy*, 360 U.S. 474, 496-497 (1959):

"Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. . . . We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. . . . This court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, but also in all types of cases where administrative and regulatory actions were under scrutiny." (Citations omitted)

The right of a *party* to be personally present and assist counsel at the hearing is not satisfied by permitting counsel to be present under an injunction to keep the proceedings secret from his client. The right is personal to the party because a fair trial "might be thought as a general rule to depend critically on one's ability to participate effectively in one's own litigation." *In re San Juan Star Co.*, 662 F.2d 108, 118 (1st Cir. 1981). See also, e.g., *Abourezk v. Reagan*, 785 F.2d 1043, 1060-61 (D.C. Cir.), cert. granted, 107 S.Ct. 666 (1986) ("It is a hallmark of our adversary system that we safeguard party access to the evidence tendered in support of a requested court judgment."); *Helminski v. Ayerst Laboratories*, 766 F.2d 208, 218 (6th Cir.), cert. denied, 106 S. Ct. 386 (1985) ("[E]xclusion of a party who is able to comprehend the proceedings and aid his attorney would infringe upon the 'fundamental standards of fairness which every litigant before a federal court has a right to

expect' "); *Doe v. District of Columbia*, 697 F.2d 1115, 1119-20 (D.C. Cir. 1983).

The ITC's predecessor (the Tariff Commission, renamed the ITC in 1974) functioned as an investigative agency and advisor to the President on allegedly unfair practices in import trade, but not as an adjudicatory body. See *Frischer & Co. v. Bakelite Corp.*, 39 F.2d 247, 258 (C.C.P.A.), *cert. denied*, 282 U.S. 852 (1930). Because of its limited function, the Commission's investigations could be conducted in secret and the rights of confrontation and cross-examination were limited. *Id.* at 261. In *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294 (1933), Justice Cardozo, writing for this Court, upheld these procedures but *only* in those cases where the agency functioned as an investigatory rather than adjudicatory body:

"The Tariff Commission advises; these others ordain. . . . Whatever the appropriate label, the kind of order that emerges from a hearing before a body with power to ordain is one that impinges upon legal rights in a very different way from the report of a commission which merely investigates and advises." 288 U.S. at 318 (citations omitted).

However, the Court cautioned: "If [the Commission] was under a duty to give a hearing similar to one in court, it was bound to expose everything, details as well as summaries." 288 U.S. at 321.

Since 1974, the ITC no longer acts as an investigator and advisor to the President under Section 337, but rather acts as a judicial body with authority to determine the rights of the parties. Thus, as his *Norwegian Nitrogen* opinion presaged, Judge Cardozo's rationale in *Ohio Bell* now applies and access to the evidence is mandatory.

The court below ignored these and other precedents cited by Akzo and followed instead the ITC's *Rotary Wheel Printers* decision, *supra*. That decision relied on precedent dealing with

the agency's *investigative* function under Title VII of the Tariff Act, 19 U.S.C. §§ 1671-1677, to deny access to pre-trial discovery to in-house counsel for a party which, unlike Akzo, conceded it could prepare an adequate defense in any event. It is the product of an earlier attitude wholly inappropriate in a full due process hearing.²⁴

Since only the most compelling reasons can justify foreclosure of *public scrutiny* of evidence offered at trial, it necessarily follows that if a party itself could *ever* be deprived of access to the evidence against it during trial (which we submit it cannot), it could only be after the most extraordinary showing of need by the party seeking secrecy. In *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982), *cert. denied*, 460 U.S. 1051 (1983), the Second Circuit said:

"Private matters which are discoverable may, upon a showing of cause, be put under seal under Rule 26(c), in the first instance. . . .

"At the adjudication stage, however, very different considerations apply. An adjudication is a formal act of government, the basis of which should, absent exceptional circumstances, be subject to *public scrutiny*. . . . Indeed, any other rule might well create serious constitutional issues. See *Globe Newspaper Co. v. Superior Court*, ____ U.S. ____, 102 S. Ct 2613, 73 L. Ed. 2d 248 (1982)." (Emphasis added).²⁵

²⁴ Even with respect to pre-trial discovery, *Rotary Wheel Printers reversed* the burden of proof imposed by Rule 26(c), Fed. R. Civ. P., which requires a movant for a pretrial discovery protective order to show good cause. The ITC's standard practice is just the opposite: at no stage is the party claiming confidentiality required to prove it; any information the possessor stamps "confidential" is kept from the other side—not only at the discovery stage but at the hearing as well—*unless* the party seeking access can prove that it is "absolutely necessary" for it to know the evidence it does not know.

²⁵ See also *Wilson v. American Motors Corp.*, 759 F.2d 1568, 1571 (11th Cir. 1985); *In re Continental Illinois Securities Litigation*, 732 F.2d 1302, 1314-15 (7th Cir. 1984).

As Chief Justice Burger wrote in *Richmond Newspapers v. Virginia*, 448 U.S. 555, 572 (1980), "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."

Here there was nothing that could justify exclusion of the public and the press. *A fortiori*, the parties whose rights were being adjudicated were entitled to be present and to assist counsel in scrutinizing the evidence against them.

II.

ONLY AN ARTICLE III COURT MAY ADJUDICATE THE PATENT AND OTHER MATTERS DECIDED BY THE ITC HERE

From the beginning of the Republic until the 1974 amendments to the Tariff Act noted above (pp. 16-17), patent issues were tried exclusively in the United States district courts. The ITC was not permitted to adjudicate patent validity (or consider legal or equitable defenses, such as misuse) in Section 337 cases because it was thought that to do so would violate Article III. See *Frischer & Co. v. Bakelite Corp.*, *supra*, 39 F.2d at 258 ("The right to pass upon the validity of a patent which has been issued by the Patent Office is a right possessed only by the courts of the United States given jurisdiction thereof by law."). Nonetheless, in 1974, Congress amended Section 337 to authorize the ITC to determine patent and other legal and equitable issues raised as a result of a Section 337 complaint of a private party.

Article III, § 1, safeguards a party's right to have claims decided before judges who are "free from potential domination by other branches of government", *United States v. Will*, 449 U.S. 200, 218 (1980). It was intended to assure that judicial power would be vested in a body of judges insulated from "majoritarian pressures" and free from

“possible coercion or influence by the executive or legislative branches of the Government.” *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 16 (1955).

This Court has vigilantly maintained that an Article III court must adjudicate claims that are inherently judicial. In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), these were described as claims which have traditionally been tried in Article III courts and which are “at the core of the historically recognized judicial power”, 458 U.S. at 70 (opinion of Brennan, J.); they include “the stuff of the traditional actions at common law tried by the courts at Westminster in 1789”, *id.* at 90 (Rehnquist, J., concurring). The patent and antitrust issues tried by the ITC here are just such stuff.²⁶ Indeed, issues of patent validity were tried by the court at Westminster since 1624. 1 E. Lipscomb, *Walker on Patents* § 1:3, at 16-20 (3d ed. 1984).

The issues adjudicated by the ALJ here essentially involved private rights. The ITC complaint was prepared and prosecuted by DuPont, allegedly to protect its property rights, and was defended by petitioners. The “substantial injury” required was injury to the private complainant. The issues of patent validity and enforceability litigated before the ALJ were issues that are usually the exclusive

²⁶ One of Akzo’s defenses was that DuPont’s Kevlar industry was not worthy of Section 337 protection because it was being operated in violation of the Sherman Act 15 U.S.C. §§ 1, 2. This was based on DuPont’s “Value in Use” (or “traffic will bear”) pricing system under which DuPont charged 18 different prices for Kevlar, depending on the availability of substitutes in the end use contemplated. This was enforced by DuPont’s policing its customers’ (and their customers’) sales and uses of aramid fibers, and fining a customer who used (or sold) aramid fibers for a higher-valued end use so as to make any such activity unprofitable (JA 1028-29, 1033-34).

province of a district court, and the resulting exclusion order is the equivalent of a final court injunction.²⁷

In *Commodity Futures Trading Commission v. Schor*, 106 S. Ct. 3245 (1986), this Court held that the adjudication of state law counterclaims in proceedings before the Commodity Futures Trading Commission ("CFTC") did not violate Article III. The Court reasoned that CFTC orders (like those of the agency in *Crowell v. Benson*, 285 U.S. 22 (1932), but unlike those of bankruptcy courts in *Northern Pipeline*) "are subject to *de novo* review" in a district court using a "weight of the evidence" standard (106 S. Ct. at 3259). It also noted that Congress, in authorizing the CFTC to adjudicate counterclaims, intended to create an "inexpensive and expeditious alternative forum" which was "relatively immune from political pressures" and had "obvious expertise" in applying the Commodity Exchange Act (*id.* at 3260). Each of these factors favors an Article III court in the case of patent infringement claims heard by the ITC:

1. Unlike CFTC orders, which are enforceable only by district court order after *de novo* review, ITC orders are self-executing and are subject to review only by the CAFC under the deferential "substantial evidence" standard, rather than the more demanding "weight of evidence" standard that was held to be

²⁷ In defending this very ITC proceeding to the European Commission, the United States Trade Representative characterized it as a private dispute. See Comments of the United States of America Regarding the European Communities' Investigation of the Exclusion from the U.S. Market of Aramid Fibers Produced by Akzo NV or Its Affiliates at 1: "The issue here is a dispute between *private* parties over the exclusive rights conferred by patents in various countries." (Emphasis added).

constitutionally required in *Crowell v. Benson*, 285 U.S. 22 (1932).²⁸

2. Unlike the CFTC, which was thought by Congress to be "relatively immune from the 'political winds that sweep Washington' " (106 S. Ct. at 3250) the ITC is an unabashedly political agency that views its mission as protecting U.S. firms from foreign competition.²⁹
3. Unlike the CFTC, which was established as an expert agency to oversee "the volatile and esoteric futures trading complex" (*id.*), the ITC lacks expertise in either legal or patent matters.

The decision below dealt abruptly with petitioners' Article III contention as a "kitchen sink" argument (App. A, 28a). Ignoring this Court's observation five months earlier that it "has rejected any attempt to make determinative for Article III purposes the distinction between public and private rights" (106 S. Ct. at 3259), the CAFC concluded that an Article III court was not required precisely on the basis of that distinction—stating that Section 337 was enacted to protect the

28 The decision below explained the difference as follows:

"[T]he substantial evidence standard does not allow a court to conduct a *de novo* investigation of the evidence on the record before it and reach an independent conclusion. . . . The mere fact that a reasonable person might reach some other conclusion is insufficient for this court to overturn the agency's conclusion" (App. A, 11a).

29 The discriminatory purpose behind Section 337 was recently acknowledged in a statement to the House Judiciary Committee by former ITC Chairwoman Paula Stern who said: "The original intent of 337 was the protection and consequent encouragement of American production, American jobs, American capital. . . ." She opposed a proposed amendment to Section 337 to do away with the "injury to a domestic industry" standard because "[e]liminating the industry requirement would likely lead to a substantial increase in the use of section 337 by foreign companies." *Intellectual Property and Trade: Hearings Before Subcomm. on Courts, Civil Liberties, and Administration of Justice of House Comm. on Judiciary*, 99th Cong., 2d Sess. 6 (1986) ("Trade Hearings").

public interest, and even suggesting that Section 337 proceedings are merely investigative (App A, 28a). This is precisely the reasoning rejected in *Schor*. In short, the CAFC simply refused to come to grips with the serious issue here posed.

III.

SECTION 337, AS INTERPRETED IN THE DECISION BELOW, FAILS TO ACCORD "NATIONAL TREATMENT" TO FOREIGN NATIONALS AND FOREIGN GOODS IN VIOLATION OF U.S. TREATY OBLIGATIONS

If Akzo were a U.S. manufacturer accused of infringing a DuPont patent, or of unfair competition in violation of federal law, the case would have been tried in a federal district court by an Article III judge. Akzo would not have been denied access to the evidence against it or excluded from the courtroom, and factual findings by the district court would not be immunized from full appellate review. In addition, Akzo could have asserted a counterclaim based on DuPont's use of Akzo's patented process which is an essential step in making aramids—an issue raised as an equitable defense by Akzo but stricken in the ITC proceedings. Since none of these protections was afforded to petitioners and their imports by the ITC, they were not accorded "national treatment" as required by U.S. treaty obligations under the General Agreement on Tariffs and Trade ("GATT", App. C, 57a)³⁰ and the Treaty of Friendship, Commerce and Navigation with the Nether-

³⁰ 4 Bevans 639, 61 Stat. 5, T.I.A.S. No. 1700 (signed by the U.S. in October 1947).

lands ("Netherlands Treaty", App. C, 57a-59a).³¹ Article III(2) of the GATT provides:

"The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded *treatment no less favorable than that accorded to like products of national origin* in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use." (Emphasis added)

The Netherlands Treaty contains a similar provision. Article XVI(1) provides:

"Products of either Party shall be accorded, within the territories of the other Party, national treatment and most-favored-nation treatment in all matters affecting internal taxation, sale, distribution, storage and use."

"National treatment" is defined in Article XXIII as "treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of such Party."

³¹ The Netherlands Treaty, 8 U.S.T. 2043, T.I.A.S. No. 3942 (entered into force December 5, 1957), is one of many similar agreements which the United States entered into following World War II which contain virtually identical provisions, and thus this treaty issue is one of "widespread importance." *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 182 n. 7, 185 (1982). These include Treaties of Friendship, Commerce and Navigation with Denmark, Oct. 1, 1951, 12 U.S.T. 908, T.I.A.S. No. 4797; Federal Republic of Germany, Oct. 29, 1954, 7 U.S.T. 1839, T.I.A.S. No. 3593; Greece, Aug. 3, 1951, 5 U.S.T. 1829, T.I.A.S. No. 3057; Ireland, Aug. 23, 1951, 1 U.S.T. 785, T.I.A.S. 2155; Israel, Aug. 23, 1951, 5 U.S.T. 550, T.I.A.S. No. 551; Italy, Feb. 2, 1948, 12 U.S.T. 121, T.I.A.S. No. 4685; Japan, April 2, 1953, 4 U.S.T. 2063, T.I.A.S. No. 2863; Korea, Nov. 28, 1956, 8 U.S.T. 2217, T.I.A.S. No. 3947; Pakistan, Nov. 12, 1959, 12 U.S.T. 110, T.I.A.S. No. 4683; and Taiwan (Republic of China), Nov. 4, 1946, 63 Stat. 1299, T.I.A.S. No. 1871.

The CAFC found that Akzo had received national treatment on the basis that "both Akzo and DuPont were bound by identical procedures" (App. A, p. 28). The question is not whether the denial of due process affected both parties equally (which, as noted above, it clearly did not). Instead, it is whether Akzo's imports were "accorded treatment no less favorable than that accorded to like [domestic] products". Determination of this issue requires resort to a comparison with district court infringement proceedings since domestic products are never subjected to ITC proceedings. For the procedural due process reasons already noted, it is clear from any such comparison that Akzo and its products did not receive national treatment here.³²

The opinion below relies on *Spring Assemblies and Components Thereof*, Inv. No. 337-TA-88, 216 U.S.P.Q. 225 (ITC 1981), *aff'd on other grounds sub nom. General Motors Corp. v. U.S. International Trade Commission*, 687 F.2d 476, (C.C.P.A. 1982), *cert. denied* 459 U.S. 1105 (1983), in which the ITC held Section 337 does not violate the GATT because it gives the ITC jurisdiction over foreign made products even if they are imported by a U.S. corporation. There, the GATT issue was not considered by the appellate court. We submit it was wrongly decided by the ITC, which ignored the key fact that foreign *goods* are protected by the GATT (and other

³² Among other differences, Section 337 extends only to "unfair methods of competition" and "unfair acts" in the *importation* of articles into the United States; thus only those who make or handle "foreign goods" must defend themselves in the dark or face an exclusion order. As noted above, no relief is obtainable in the ITC against the domestic complainant. Further, in the case of product patents, even if the complainant loses in the ITC because its patent is held invalid, it can enforce the same patent in a district court since an ITC ruling of patent invalidity or non-infringement has been held not to have *res judicata* effect. *Corning Glass Works v. United States International Trade Commission*, 799 F.2d 1559, 1570 n.12 (Fed. Cir. 1986); *Union Manufacturing Co. v. Han Baek Trading Co.*, 763 F.2d 42, 45-46 (2d Cir. 1985).

treaties) whether they are owned by foreign nationals or not—and foreign goods are clearly the target of Section 337.³³

CONCLUSION

Each of the questions presented is important and worthy of review by this Court. Accordingly, the writ should be granted.

Dated: March 20, 1987

Respectfully submitted,

DENIS MCINERNEY
CAHILL GORDON & REINDEL
80 Pine Street
New York, New York 10005
(212) 701-3000

Of Counsel:

DAVID R. HYDE
LAURENCE T. SORKIN
80 Pine Street
New York, New York 10005

*Counsel of Record
for Petitioners*

C. FREDERICK LEYDIG
LEYDIG, VOIT & MAYER
One IBM Plaza, Suite 4600
Chicago, Illinois 60611

³³ Similarly, a GATT panel found it unnecessary to consider the “national treatment” issue in *United States—Imports of Certain Automotive Spring Assemblies*, GATT BISD, 30th Supp. at ¶¶ 49, 61, 65-66 (May 26, 1983), stating that its refusal to do so should not be considered a precedent in future Section 337 cases. The United States agreed: in arguing for approval of the panel decision by the GATT Counsel, it stated that approval would not prejudice “national treatment” objections to Section 337 in the future. Minutes of GATT Council Meeting, GATT Doc, C/M/161 at 14 (Oct. 29, 1982). A leading authority has recently testified that the GATT Council qualified its ambiguous “approval” of Section 337 in the *Spring Assemblies* case in so many ways as to amount to a non-affirmance. Trade Hearings at 191 (statement of Prof. Robert E. Hudec, University of Minnesota Law School).



APPENDIX A

AKZO, N.V., ENKA B.V., ARAMIDE MAATSCHAPPIJ V.O.F.
AND AKZONA INCORPORATED,
Appellants,

—v.—

U.S. INTERNATIONAL TRADE COMMISSION,
Appellee,
E.I. DUPONT DE NEMOURS AND CO.,
Intervenor-Appellee.

No. 86-877

United States Court of Appeals, Federal Circuit

Dec. 22, 1986

Before:

MARKEY, *Chief Judge,*
DAVIS and NIES, *Circuit Judges.*

DAVIS, *Circuit Judge:*

This is an appeal by Akzo, N.V., Enka B.V., Aramide Maatschappij v.o.f. and Akzona Inc. (appellants or Akzo) from an exclusion order by the United States International Trade Commission (Commission or trial tribunal) pursuant to §§ 337 and 337(a) of the Tariff Act of 1930, 19 U.S.C. §§ 1337, 1337(a) (1982), prohibiting the importation into the United States of aramid fibers manufactured by Akzo in the Netherlands. We affirm.

I.

Background; Issues; Scope of Review**A. Background**

On April 18, 1984, E.I. du Pont de Nemours and Company (appellee or Du Pont) filed a complaint with the Commission under § 337 of the Tariff Act of 1930 (19 U.S.C. § 1337).¹ The complaint alleged that Akzo had engaged in unfair methods of competition and unfair acts including the importation, sale and marketing in the United States of certain aramid fibers² produced in the Netherlands by a process purportedly covered by the claims of Du Pont's U.S. Letters Patent No. 3,767,756 (the Blades or '756 patent). In addition, the complaint charged Akzo with attempting both to exploit applications of aramid fibers and to penetrate markets for aramid fibers created by Du Pont. Finally, the complaint alleged that the effect or tendency of the unfair methods of competition and unfair acts was to destroy or substantially injure an industry, efficiently and economically operated, in the United States.

After evaluating Du Pont's complaint, the Commission instituted an investigation pursuant to § 337(b), 19 U.S.C.

¹ 19 U.S.C. § 1337 (1976) provides in pertinent part:
Unfair practices in import trade

(a) Unfair methods of competition declared unlawful

Unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States, are declared unlawful, and when found by the Commission to exist shall be dealt with, in addition to any other provisions of law, as provided in this section.

² As indicated in Part II, *infra*, aramid fibers are the strongest commercial synthetic fibers known to man—about five times stronger than steel on an equal weight basis.

§ 1337(b), and an administrative law judge (ALJ) was assigned to preside over the investigation.

The major substantive question before the ALJ (and now before us) is the validity and enforceability of Du Pont's Blades patent. Those issues, and the related facts and circumstances, are set forth and discussed in Part II, *infra*. The major procedural issue is whether Akzo was denied due process because Du Pont's confidential documents were not disclosed to appellants' management. This problem (together with an alleged violation of treaty rights) is considered in Part III, *infra*. The other issues presented to us are dealt with in Part IV, *infra*.

Following 14 days of hearing, the ALJ issued an initial determination holding that there was a violation of § 337(a) of the Tariff Act of 1930 in the unlawful importation or sale of certain aramid fibers produced overseas by means of a process that if practiced in the United States would infringe the Blades '756 patent, and that importation has the tendency to injure substantially an efficiently and economically operated industry in the United States.

Akzo filed a petition for review of the ALJ's initial determination on June 3, 1985. On July 15, 1985, the Commission decided to review only those portions of the initial determination pertaining to anticipation and obviousness of the Blades '756 patent under 35 U.S.C. §§ 102 and 103. Ultimately, the Commission affirmed the ALJ's findings and conclusions on anticipation and obviousness and determined that appellants had failed to prove the Blades '756 patent invalid. Having decided not to review the remainder of the initial determination, the Commission concluded that there was a violation of § 337. Accordingly, on November 25, 1985, the Commission, after further consideration, entered an exclusion order limited to certain forms of aramid fibers produced by Akzo. The Commission's order became final on January 25, 1986 when the President declined to overrule it pursuant to § 337(g).

B. Issues

On this appeal, Akzo raises a number of issues for us to resolve:

- (1) whether the Commission's finding that claim 13 of the '756 patent was "not invalid" and "not unenforceable" is supported by substantial evidence;³
- (2) whether Akzo's due process and treaty rights were violated in the Commission proceeding;
- (3) whether the Commission, as a non-Article III tribunal, is constitutionally prohibited from adjudicating the validity and enforceability of patents;
- (4) whether the Commission's finding that Akzo's sales of aramid fibers in the United States would have a tendency to "destroy or substantially injure" an industry economically and efficiently operated is supported by substantial evidence;
- (5) whether the Commission's conclusion that Du Pont's value-in-use pricing did not violate the antitrust laws is correct and supported by substantial evidence; and
- (6) whether it is a defense to Du Pont's complaint that Du Pont employed a solvent included in a polymerization process patented by Akzo.

C. Scope of review

This court defined our scope of review in cases appealed from the Commission in *Beloit Corp. v. Valmet OY*, (Order), 742 F.2d 1421, 223 USPQ 193 (1984), *cert. denied*, 472 U.S. 1009, 105 S.Ct. 2706, 86 L.Ed.2d 721 (1985). There we held that the court "does not sit to review what the Commission has not decided." 742 F.2d at 1423, 223 USPQ at 194. *Beloit* is distinguishable from this case because there the Commission

³ Akzo presents no contention that, if claim 13 of the '756 patent is valid and enforceable, Akzo would not infringe if it used its same process in this country.

specifically adopted only a portion of the presiding official's initial decision. See, e.g., *American Hospital Supply Corp. v. Travenol Laboratories, Inc.*, 745 F.2d 1, 5 n. 13, 223 USPQ 577, 580 n. 13 (Fed.Cir.1984). In contrast, in the current case, the Commission merely determined not to review the remainder of the initial decision, choosing to conduct its own §§ 102 and 103 analysis. The Commission neither rejected any part of the initial determination nor did it say that it was taking no position on any part of it. Although the Commission limited its own review to patent validity under §§ 102 and 103, the fact that it affirmed the conclusion of the ALJ that there was a § 337 violation makes reviewable those conclusions of the ALJ necessary for the Commission to have determined (as it did) that there was a § 337 violation. *Accord Warner Brothers, Inc. v. U.S. International Trade Commission*, 787 F.2d 562, 229 USPQ 126 (Fed.Cir.1986). This includes not only the §§ 102 and 103 issues of anticipation and obviousness, but also whether there was inequitable conduct before the Patent Office and the other issues decided by the Commission and the ALJ.⁴

⁴ 19 C.F.R. § 210.53(h) (1986) provides that "[a]n initial determination . . . shall become the determination of the Commission . . . unless the Commission . . . shall have ordered review of the initial determination or certain issues therein. . . ." In accepting the necessary conclusions of the ALJ we do not hold that the Commission must have concurred with each and every individual factual finding of the ALJ to support its conclusion.

II.

Validity and Enforceability of the Blades Patent

A. The Invention.⁵

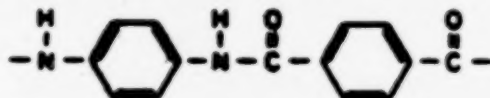
The Blades '756 patent, "Dry-Jet Wet Spinning Process," was issued on October 23, 1973 to Dr. Herbert Blades and immediately assigned to Du Pont. The patent describes a method that produces a high strength synthetic polyamide⁶ fiber which Du Pont has marketed under the trade name Kevlar. This fiber has an extraordinary as-spun strength, five times stronger pound for pound than steel, as well as a modulus (stretch resistance) equal to glass, eight times as high as industrial grade polyester, and twenty-five times as high as industrial nylon. Kevlar is also much more heat resistant than industrial-grade nylon or polyester. These extraordinary physical properties, as well as Kevlar's light weight and rustproof character, have enabled Du Pont to market it for use in a variety of applications including, but not limited to, roping, spacecraft and airplane parts, bullet resistant clothing and armor, tires, and boat hulls. Depending upon its use, Kevlar has been used as a substitute for steel, aluminum, asbestos, nylon, rayon, polyester, cotton, or cotton fiber. Kevlar is available as either a continuous rope or filament, or alternatively as a staple or pulp. Staple consists of short filaments which can be spun into yarn. Pulp is ground fiber most often used as an asbestos substitute.

The procedure by which the synthetic fiber is manufactured involves dry spinning polyamides from coagulation solutions called dopes. In dry spinning, a specialized filter called a

⁵ Our recitation of the facts follows the ALJ's and the Commission's findings which are supported by at least substantial evidence. See *Surface Technology, Inc. v. U.S. International Trade Commission*, 801 F.2d 1336, 1340, 231 USPQ 192, 195 (Fed.Cir.1986).

⁶ Polyamides are polymers containing amide linkages. Aromatic polymers are polyamides where the radicals linking the amide linkages constitute aromatic radicals. The polymer described in claim 13 of the Blades '756 patent is a wholly aromatic para-positioned polyamide.

spinneret is placed a short distance from a bath of spinning dope that is extruded through a layer of gas and into an aqueous coagulation bath.⁷ The dope used in the Blades '756 patent consists of para-positioned aromatic polyamides dissolved in highly concentrated sulfuric acid and heated to around 100°C. The polyamide used is a high molecular weight poly(p-phenylene terephthalamide) (PPD-T).



The high molecular weight of the polyamide results in a high inherent viscosity⁸ of approximately 4.4% when 20% PPD-T by weight is dissolved in approximately 100% sulfuric acid.

In 1969 Dr. Blades, one of Du Pont's research scientists, began to develop and conduct experiments aimed at producing a high-strength synthetic fiber. Blades exclusively employed a wet-spinning method in his early work, using PPD-T as well as other polymers. This early work had minimal success. Although the dry-spinning method was known by Du Pont scientists, a 1966 report indicated that the low solubility of PPD-T precluded use of the dry-spinning technique. In 1969, Du Pont's Dr. Peter Boettcher suggested to Blades that dry spinning might improve the end-results by influencing coagulation. Dr. Boettcher had learned about dry spinning from a Monsanto Morgan patent (Morgan 3,414,645 patent).

Blades' early experimentation with the dry-spinning process did not yield fiber with an increased tenacity despite the fact that dry spinning was known to improve fiber tenacity using

⁷ Dry spinning can be contrasted with wet spinning where the spinneret is placed directly into the spinning dope. Wet spinning is the process used to make a number of synthetic fibers including rayon and nylon.

⁸ Inherent viscosity (η_{inh}) is a measure of viscosity used in polymer chemistry.

$$\eta_{inh} = \ln \eta_{r/c} \quad \text{where} \quad \eta_{r/c} = \frac{\eta_{\text{solution}}}{\eta_{\text{solvent}}}$$

measured at the same temperature.

other dopes. Blades' initial conclusion was that dry spinning would be unsuccessful with PPD-T. Nevertheless, he continued experimenting with the dry-spinning process, and, at his supervisor's suggestion, began using sulfuric acid as a solvent. Blades also redesigned and built a mixing device because of some difficulties he encountered mixing PPD-T with the sulfuric acid. Sulfuric acid was not an evident candidate as a solvent because it was known to react with the polymer and become degraded at high temperatures. Blades discovered, however, that he could produce an improved fiber using 10.2% polyamide in about 100% sulfuric acid. Under this system he found that there was no difference in tensile strength of the fiber using a wet-spun or dry-spun method. PPD-T was a somewhat unusual choice of polymer for this work because of its characteristic rigidity caused by the placement of para-oriented aromatic rings in the chain. The para-positioning of the aromatic rings makes the polyamide much less soluble than analogous meta-positioned rings. But the fact is that, while meta-positioned polymers generally form only isotropic solutions, para-positioned polymers of Blades' invention form anisotropic solutions⁹ at high concentrations.

In subsequent trials, Blades increased the concentration of PPD-T and obtained a significantly improved fiber, especially using the dry-spinning method. When the system was operated at room temperature, however, he found that undissolved polyamide clogged up the holes of the spinneret. He therefore heated the dope at these higher concentrations to dissolve all the polyamide and keep the system above the melting point. To his surprise, Blades discovered that there was little or no degradation of the polyamide at high temperatures. He explained this unexpected absence of degradation by theorizing that, when the system contains high concentrations of PPD-T,

⁹ An anisotropic solution exhibits optical birefringence (i.e., the liquid crystalline solution refracts light in two directions). This characteristic imparts a high degree of orientation to the spun fibers yielding a stiffer and stronger end product without requiring post-coagulation drawing as is required in other man-made fibers such as nylon and rayon.

the sulfuric acid binds to the polymer and chemically deactivates it.

After numerous trials, Blades found that an optimal fiber could be produced using PPD-T of 4.4 inherent viscosity at a 20% concentration in approximately 100% sulfuric acid. The dope was then heated to 95°C and dry spinning was then carried out at about 100°C. The resultant fiber had a tenacity of approximately two times that of previous experimental fibers.

In April 1971, Blades filed an application with the PTO claiming the method of making these aramid fibers. The initial application and two subsequent applications were rejected in large part on the basis of anticipation by the Morgan '645 and the Kwolek 3,671,542 patents which Du Pont had brought to the attention of the examiner. Initially the examiner also rejected the application under 35 U.S.C. § 103. Blades, however, was able to overcome the examiner's objections, and on May 2, 1973, the PTO gave notice of allowance of the Blades '756 patent. Blades assigned the patent rights to Du Pont.

B. Validity

Claim 13, the narrowest claim, is the only claim involved on this appeal.¹⁰ Akzo says that that claim is invalid under 35 U.S.C. §§ 102 and 103. More specifically, Akzo argues that the Commission misconstrued the legal standard of anticipation and therefore erroneously held that the Blades '756 patent was not anticipated. In addition, appellants argue that the Commission failed properly to evaluate the prior art in determining obviousness *vel non*. Of course, it goes without elaboration

¹⁰ Claim 13 reads as follows:

A method comprising extruding a spinning dope from an orifice through a layer of gas and into an aqueous bath at a temperature of under 50°C said dope comprising a polyamide and a solvent of sulfuric acid of at least 98% concentration at a concentration of at least 40 grams of said polyamide per 100 ml. of solvent, said polyamide having an inherent viscosity of at least 3.0 and being poly(p-phenylene terephthalamide).

that the Blades '756 patent enjoys a presumption of validity under 35 U.S.C. § 282.

As we have said, Akzo challenges the Commission's use of § 102, claiming that that tribunal misinterpreted the legal standard of anticipation. Under 35 U.S.C. § 102, anticipation requires that each and every element of the claimed invention be disclosed in a prior art reference. *W.L. Gore & Associates, Inc. v. Garlock, Inc.*, 721 F.2d 1540, 1554, 220 USPQ 303, 313 (Fed.Cir.1983), *cert. denied*, 469 U.S. 851, 105 S.Ct. 172, 83 L.Ed.2d 107 (1984). In addition, the prior art reference must be enabling, thus placing the allegedly disclosed matter in the possession of the public. *In re Brown*, 329 F.2d 1006, 1011, 141 USPQ 245, 249 (CCPA 1964). Akzo asserts, however, that the Commission wrongly used an "*ipsissimis verbis* test" in reaching its conclusion that the Blades '756 patent was not anticipated by the Morgan '645 disclosure.¹¹ We do not read the Commission's opinion as requiring such an "*ipsissimis verbis* test." Rather, we understand that opinion as simply finding that the prior art reference did not disclose, to one of ordinary skill in the art,¹² the process for making the aramid fibers described in claim 13. The Commission noted that while the Morgan '645 patent called for the use of sulfuric acid, it did not call for the use of at least 98% concentrated sulfuric acid which was critical for the success of the Blades process. The Commission also concurred with the ALJ and found that concentrated sulfuric acid is not inherently 98% sulfuric acid to one skilled in the art.

Because we determine that the Commission did not use an incorrect legal standard under § 102, we are bound to accept its and the ALJ's factual findings if supported by substantial evidence. 5 U.S.C. § 706 (1982). As appellants themselves point out, anticipation under § 102 is a factual determination.

¹¹ An "*ipsissimis verbis*" test requires the same terminology in the prior art in order to find anticipation.

¹² The Commission made specific findings on the skill of the art. It concluded that the skill in the art was high—that of a doctorate or post-doctorate in chemistry.

Lindemann Maschinenfabrik GMBH v. American Hoist & Derrick Co., 730 F.2d 1452, 1458, 221 USPQ 481, 485 (Fed.Cir.1984). We must conclude that there is substantial evidence in the record supporting the Commission's conclusion that claim 13 of the Blades '756 patent was not anticipated by the prior art. As the Supreme Court noted in *Universal Camera v. NLRB*, 340 U.S. 474, 488, 71 S.Ct. 456, 464, 95 L.Ed. 456 (1951), the substantial evidence standard does not allow a court to conduct a *de novo* investigation of the evidence on the record before it and reach an independent conclusion; rather, the court's review is limited to deciding whether there is sufficient evidence in the record considered as a whole to support the agency's findings. The mere fact that a reasonable person might reach some other conclusion is insufficient for this court to overturn the agency's conclusion. See *SSIH Equipment S.A. v. U.S. International Trade Commission*, 718 F.2d 365, 381, 218 USPQ 678, 691 (Fed.Cir.1983) (additional views of Judge Nies).

The ALJ concluded, after extensive analysis, that the claimed invention of the Blades '756 patent was not anticipated by prior art, including the Morgan '645 patent. He noted that, while the Morgan '645 patent teaches the use of an airgap, the use of an airgap in and of itself does not guarantee an improved fiber. This was obvious from Blades' early work. The ALJ also found that sulfuric acid in any concentration was not disclosed as a solvent in the Morgan '645 patent; nor did that patent disclose PPD-T in its optically anisotropic state. Moreover, the ALJ found that the Morgan '645 patent was not an enabling disclosure with regard to the claimed spinning dope. Neither the 18% concentration of PPD-T nor the heating of the dope to achieve this concentration was disclosed in the Morgan '645 patent. The ALJ also rejected appellants' arguments that the Blades process was anticipated by the Hill and Smith patents which were referenced in the Morgan '645 patent. This would have required Blades randomly to pick and choose among a number of different polyamides, a plurality of solvents, and a range of inherent viscosities. The ALJ rejected

such "random picking and choosing" of prior art, relying on *In re Arkley*, 455 F.2d 586, 587, 172 USPQ 524, 526 (CCPA 1972), and concluded in effect that the anticipatory reference must disclose in the prior art a thing substantially identical with the claimed invention. In a somewhat more limited consideration—restricted to the concentration of sulfuric acid in the Blades patent—the Commission itself reached the same result.

Accordingly, we hold that there is substantial evidence in the record as a whole to sustain the Commission's (including the ALJ's) findings that the Blades process was not anticipated by any prior art.¹³

Appellants say, as an alternative to their § 102 argument, that the trial tribunal erred when it failed to find that the Blades '756 patent would have been obvious under 35 U.S.C. § 103 in view of the Morgan '645 and Kwolek '542 patents. It is now established that obviousness is a question of law based on factual inquiries which include:

- (1) the scope and content of the prior art;
- (2) the difference between prior art and the claims at stake;
- (3) the level of ordinary skill in the art; and
- (4) objective evidence of nonobviousness (secondary factors).

Such objective indications as commercial success and long-felt but unresolved needs, failure of others, copying, and unexpected results are relevant facts relating to the issue of validity. See, e.g., *In re DeBlauwe*, 736 F.2d 699, 222 USPQ 191

¹³ Appellants cite this court's opinion in *Titanium Metals Corp. v. Banner*, 778 F.2d 775, 782, 227 USPQ 773, 778-79 (Fed.Cir.1985), as supporting their contention that the Blades '756 patent was anticipated by the prior art. *Titanium Metals* is easily distinguishable from this case. There, a single reference disclosed a range of alloys including that claimed by appellant. In this case, the Commission found that neither the Morgan '645 patent nor any other prior art reference disclosed the Blades '756 process.

(Fed.Cir.1984) (obviousness a question of law to be determined on the facts). Since obviousness is a question of law, we are not bound by the Commission's ultimate determination on the matter of § 103 obviousness. See *Corning Glass Works v. U.S. International Trade Commission*, 799 F.2d 1559, 1565 & n. 5, 230 USPQ 822, 826 & n. 5 (Fed.Cir.1986).

In the proceedings before the Commission, Du Pont premised its defense of nonobviousness on the basis that the prior art—mainly that the Morgan '645 patent and the Kwolek '542 patent—actually led away rather than toward the Blades process. The Commission found Du Pont's expert witness' testimony to be compelling. That witness, Dr. Uhlmann, explained why the Morgan '645 patent, when considered with other prior art references, including the Kwolek '542, Bair 3,817,941 and Cipriani 3,227,793 patents, would not have rendered the invention of Blades '756 patent obvious. The Kwolek '542 patent calls for conventional wet or dry spinning and calls for concentrations of PPD-T far lower than required by the Blades process. The Bair '941 patent does not disclose heating sulfuric acid with PPD-T to achieve an anisotropic solution. While the Morgan '745 patent discloses air-gap spinning, its emphasis is on meta-oriented polymers. Based on these differences, Dr. Uhlmann concluded that one skilled in the art would *not* combine them or be led to the Blades invention.

As the ALJ recognized, prior art references before the tribunal must be read as a whole and consideration must be given where the references diverge and teach away from the claimed invention. *W.L. Gore & Associates, Inc. v. Garlock*, 721 F.2d 1540, 1550, 220 USPQ 303, 311 (Fed.Cir.1983), *cert. denied*, 469 U.S. 851, 105 S.Ct. 172, 83 L.Ed.2d 107 (1984). Moreover, appellants cannot pick and choose among individual parts of assorted prior art references "as a mosaic to recreate a facsimile of the claimed invention." 721 F.2d at 1552, 220 USPQ at 312. In this case, the ALJ found that Akzo's expert witnesses could not show how the prior art patents could be brought together to render the Blades '756 invention obvious

reconstructing the teachings of those patents assisted by hindsight.

The secondary considerations also compelled the Commission to make a finding of nonobviousness. The commercial success of Du Pont's Kevlar patent has been enormous and its range of uses substantial. Du Pont is still developing commercial applications for Kevlar, having spent significant amounts of money in developing both new uses and new markets for the product. Commercial success is, of course, a strong factor favoring nonobviousness. *Simmons Fastener Corp. v. Illinois Tool Works, Inc.*, 739 F.2d 1573, 1575-76, 222 USPQ 774, 777, (Fed.Cir.1984), *cert. denied*, 471 U.S. 1065, 105 S.Ct. 2138, 85 L.Ed.2d 496 (1985). Moreover, as the ALJ noted, Blades solved a problem that Du Pont research scientists had been tackling for years. The Blades process represents a solution to a long-felt need and practitioners in the field immediately recognized that that process was a remarkable advancement in polymer spinning technology. Indeed, as brought out in this appeal, even one of Akzo's scientific reports repeatedly expressed concern for degradation of PPD-T and amazement at the disclosure of the Blades '756 process.

We agree, therefore, with the Commission's determination that the Blades '756 patent is not invalid for anticipation or obviousness.

C. Alleged inequitable conduct before the Patent and Trademark Office (PTO)

Appellants urge that Du Pont misled the patent examiner in two respects: first, that Du Pont submitted an affidavit to overcome the examiner's obviousness objections that failed to compare the Blades process with the closest prior art; and, second, that Du Pont persistently argued that the Morgan '645 patent and the Kwolek '542 patent did not anticipate the Blades patent.

In *J.P. Stevens & Co. v. Lex Tex Ltd.*, 747 F.2d 1553, 223 USPQ 1089 (Fed.Cir.1984), *cert. denied*, ____ U.S. ____, 106 S.Ct. 73, 88 L.Ed.2d 60 (1985), this court articulated a two-prong test for establishing inequitable conduct before the PTO. To render a patent unenforceable, the proponent of the inequitable conduct must first establish by clear and convincing evidence that there was a material misrepresentation or omission of information, and then establish a threshold level of intent on the part of the applicant. *See also Atlas Powder Co. v. E.I. du Pont de Nemours & Co.*, 750 F.2d 1569, 1577-78, 724 USPQ 409, 414-15 (Fed.Cir.1984).

Our major standard for materiality is whether a reasonable examiner would consider the omission or misrepresentation important in deciding whether to issue the patent.¹⁴ Materiality and intent must also be considered together: the more material the omission or misrepresentation, the less intent that must be shown to reach a conclusion of inequitable conduct. *American Hoist & Derrick Co. v. Sowa & Sons*, 725 F.2d 1350, 1363, 220 USPQ 763, 773 (Fed.Cir.), *cert. denied*, 469 U.S. 821, 105 S.Ct. 95, 83 L.Ed.2d 41 (1984).

We uphold the Commission's findings and conclusion that Du Pont's affidavit or arguments before the examiner did not constitute material misrepresentations. As Akzo concedes, the examiner had both the Morgan '645 patent and the Kwolek '542 patents before him throughout the examination process. It was on the basis of these two patents that Du Pont's first three applications were rejected. The mere fact that Du Pont attempted to distinguish the Blades process from the prior art does not constitute a material omission or misrepresentation. The examiner was free to reach his own conclusion regarding the Blades process based on the art in front of him. Nor does Du Pont's affidavit, advocating a particular interpretation of the Morgan '645 and Kwolek '542 patents (albeit favorable to Du Pont's position), show any intent to mislead the PTO. Du Pont's intent was not to mislead, but rather to distinguish prior

¹⁴ This standard is identical to the PTO standard of materiality. 37 C.F.R. § 1.56(a).

art from the Blades process and demonstrate to the examiner that the Blades process would not have been obvious in light of Morgan '645 and Kwolek '542. The sum of it is that, because we cannot see either a proved material misrepresentation or a proved intent to mislead, we must conclude that Akzo has not met its burden of proving inequitable conduct before the PTO.

III.

Due Process and Treaty Rights

A. Due Process

This aspect of the appeal concerns the Commission's procedures with respect to the private parties' confidential information. On May 21, 1984, the ALJ issued an administrative protective order pertaining to confidential business information, as defined in the Commission's Rules, 19 C.F.R. § 210.30(d)(7) (1976), that would be produced during the discovery phase of the investigation.

In general, this order permitted access to all such confidential information by Akzo's and Du Pont's outside counsel but not by management personnel or in-house counsel of either private company. At a preliminary conference held June 22, 1984, Akzo made the first of three unsuccessful attempts to modify the protective order. Arguing that there was a substantial overlap between the Commission's investigation and an action brought by Akzo against Du Pont then (and still) pending in the United States District Court for the District of Delaware, Akzo moved to align the protective orders by modifying the ALJ's protective order so that its terms coincided with those of a protective order earlier issued by the District Court in the Delaware action. The ALJ denied Akzo's motion on July 6, 1984.

By letter dated June 27, 1984, Akzo requested that the protective order be amended to include three designated members of Akzo's in-house counsel. On July 6, 1984, the ALJ concluded that Akzo failed to demonstrate the requisite need

to warrant granting Akzo's in-house counsel access to Du Pont's confidential business information. Akzo renewed its motion to modify the protective order on February 8, 1985, this time urging that both Akzo's in-house counsel and the general manager of Akzo's Industrial Fiber Group should be granted limited access to Du Pont's confidential business information. Because Akzo failed (in the ALJ's view) to demonstrate a need for either its in-house counsel or its general manager to have access to the requested confidential material, the ALJ denied Akzo's motion on February 21, 1985.

Akzo now contends that the protective order, issued by the ALJ on May 21, 1984, effectively deprived it of its rights to confrontation, to rebuttal, and to effective assistance of counsel. According to Akzo, under the terms of the protective order, the parties' designation of materials as confidential had the effect of "unilaterally immunizing them from scrutiny by the opposing party." Moreover, Akzo maintains that the system established by the protective order completely denied Akzo "access to all of the critical evidence on which the decision against it was based."

Our examination of the challenged protective order, as it was enforced, shows Akzo's charges to be groundless. The protective order provides, *inter alia*, that confidential business information "shall be disclosed at any hearing only *in camera* before the Commission or the administrative law judge." Although the protective order enabled either party to designate business information as confidential, such a designation did not "unilaterally immunize" purportedly confidential documents from scrutiny by the opposing party. In the first place, all the protected information was freely available to outside counsel who could fully consider it, although they were not free to show or repeat it to Akzo's management or in-house counsel. Second, paragraph 10 of the protective order provided a mechanism by which either party was free to object to its adversary's designations at any stage of the proceeding. According to paragraph 10, if either party disagreed with respect to the designation of business material as confidential, that

party "shall confer [with the supplier] as to the status of the subject information proffered within the context of this order." In the event that the parties failed within 10 days to reach agreement as to the proper status of the information, the protective order provided that either party could submit the issue to the ALJ or the Commission for resolution. The mechanism of paragraph 10 could also be used to permit disclosure to particular persons of otherwise classified material. Although, as mentioned earlier, Akzo attempted to modify the protective order on three separate occasions, Akzo never invoked the dispute resolution procedures of paragraph 10 to challenge Du Pont's characterization of business information as confidential or as not disclosable to particular individuals. Third, the protective order expressly permitted other exceptions to be made by the ALJ or the Commission.

In denying Akzo's various motions to amend the protective order, the ALJ relied on the Commission's decision in *Certain Rotary Wheel Printers*, Inv. No. 337-TA-145, 5 ITRD 1933 (Nov. 4, 1983). According to *Rotary Wheel Printers*:

[p]rotection of confidential information is crucial to the Commission's ability to carry out its statutory responsibilities. In addition, review after discovery and the evidentiary hearing are completed would provide an inadequate remedy. The inappropriate release of confidential information can never be fully remedied. The Commission has traditionally been reluctant to release confidential information where not absolutely necessary.

5 ITRD at 1935.

Thus, implicit in Akzo's due process attack on the protective order is the position that, in the interests of fundamental fairness, it was "absolutely necessary" for Akzo's in-house counsel and general manager to have access to Du Pont's confidential business information. However, "[i]n section 337 investigations, it is the exception rather than the rule to release confidential information to in-house counsel." *Id.*

The primary justification for the Commission's reluctance to grant adversary management and in-house counsel access to confidential business information is that, in order to discharge its statutory responsibilities within the strict statutory time limits, the Commission is heavily dependent on the voluntary submission of information. Disclosure of sensitive materials to an adversary would undoubtedly have a chilling effect on the parties' willingness to provide the confidential information essential to the Commission's fact-finding processes. The Commission has resolved the difficult and controversial question of the role of in-house counsel by taking a conservative position on the side of optimum shielding of business information. Obviously, where confidential material is disclosed to an employee of a competitor, the risk of the competitor's obtaining an unfair business advantage may be substantially increased. This general Commission position is neither unreasonable nor arbitrary. It represents an appropriate balancing between the needs demanded by the Commission's process and the parties' need for participation by its in-house personnel.

This is especially true because there is no *per se* rule against disclosure to either a competitor's in-house counsel or management representative. *Rotary Wheel Printers* established, and the ALJ employed, a three-part balancing test to determine whether, to whom, and under what conditions to release confidential information. Factors to be considered include the party's need for the confidential information sought in order to adequately prepare its case, the harm that disclosure would cause the party submitting the information, and the forum's interest in maintaining the confidentiality of the information sought. 5 ITRD at 1937.

After reviewing the record, the ALJ concluded that Akzo failed to demonstrate clearly a need for granting access to confidential business information to either Akzo's in-house counsel or key management officials. The ALJ also found that disclosure would cause substantial harm to Du Pont's competitive position. These particular rulings cannot be faulted. The

court understands that all information relating to patent validity and enforceability (*see* Part II, *supra*) was promptly made fully available to all. As for the information bearing on the important question of whether Akzo's importation of aramid fibers would tend to destroy or substantially injure Du Pont's business (*see* Part IV, *infra*), it is obvious that that confidential information—relating to Du Pont's business, activities, plans and expectations—should not be made available (unless, perhaps, where absolutely necessary for a fair hearing) to a direct competitor like Akzo. That such full access was not absolutely necessary to appellants' making of their own case is shown by the crucial fact that Akzo was at all times perfectly free to offer its own market projections as well as to reveal its own activities, forecasts, and interpretations. Both sides could present to the Commission their own information on those matters without knowing those of the other side's.

Akzo argues, however, that the denial of its motions to modify the protective order effectively denied its due process right to participate in its own defense. The contention is that Akzo was subjected to serious adverse governmental action on the basis of evidence which Akzo was never permitted to know and "personally" refute. In support of this position, Akzo invokes § 555(b) of the Administrative Procedure Act which was made applicable to § 337 proceedings by the 1974 Amendments to the Tariff Act of 1930. Under § 555(b), "[a] party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding." 5 U.S.C. § 555(b). However, Akzo was represented by competent and experienced outside counsel throughout the proceedings; these counsel were aware of all confidential information. Further, Akzo fails to recognize that "the affirmative grant of the right to appear apparently bestowed by Section 555(b) is not blindly absolute, without regard to the status or nature of the proceedings and concern for the orderly conduct of public business." *deVyver v. Warden, U.S. Penitentiary*, 388 F. Supp. 1213, 1222 (M.D.Pa.1974) citing *Easton Utilities Commission v. Atomic Energy Commission*, 424 F.2d 847, 852 (D.C.Cir.1970). What-

ever else § 555(b) guarantees to parties to an administrative proceeding under § 337, it does not mandate disclosure of significant confidential information to in-house counsel and corporate executives of a business competitor—where that information is fully available to outside counsel. Akzo's contention withers in the face of unrefuted evidence that more than 90 people representing Akzo, including numerous expert witnesses and members of the battery of four law firms comprising Akzo's defense team, had unrestricted access to Du Pont's confidential information.

Akzo has also failed to demonstrate that it suffered actual harm under the confidentiality procedures instituted by the ALJ. Although Akzo's insiders were denied access to Du Pont's economic and market forecasts with respect to the production and sale of aramid fibers, Akzo was not prevented (as we have pointed out) from offering its own projections into evidence under the cover of confidentiality. It is difficult to see how Akzo was prejudiced.

Finally, we have neither found nor been directed to any judicial decision in this country mandating, in the circumstances present here, that business confidential information *must* be made available to inside management. On the contrary, we are aware, from the practice of our own court, that records in appeals to us are frequently classified in large part, and are presumably not available to the management of the opposing party. Moreover, there are a substantial number of decisions upholding confidentiality comparable to that accepted by the Commission. Akzo tells us that most of these involved only pretrial discovery (and not evidence at a hearing or trial) and that the others are also distinguishable. We do not stop to examine these arguments because, at the least, these decisions (a) show that there is no holding to the contrary of the one we now make and (b) strongly suggest the validity of

carefully tailored protective orders allowing exceptions to be made if adequate proof is made.¹⁵

B. Treaty rights

As an alternate ground for reversal, Akzo argues that, because the proceedings below discriminated against Akzo on the basis of its Dutch nationality, they violate United States treaty obligations. We disagree with Akzo's premise that there was discrimination here. Essentially, Akzo employs a *non sequitur* to support its position. The core of Akzo's claim is that it was denied the rights that would have been afforded a domestic firm sued for patent infringement in a district court. According to Akzo, this "inferior treatment" by the Commission constitutes discrimination on the basis of nationality. That analysis misses the mark. The appropriate inquiry is whether Akzo was afforded the same rights afforded to domestic firms in a § 337 proceeding before the Commission. Clearly, Akzo has failed to demonstrate that it suffered from discriminatory treatment. First, under the express terms of the protective order, both Akzo and Du Pont were bound by identical procedures regarding confidentiality and discovery. Neither party was allowed access to the other party's confidential business information. Second, the same argument was rejected in *Certain Spring Assemblies and Components Thereof*, Inv. No. 337-TA-88, 216 USPQ 225, *aff'd sub nom. General Motors Corp. v. U.S. International Trade Commission*, 687 F.2d 476, 215 USPQ 484 (CCPA 1982), *cert. denied*, 459 U.S. 1105, 103 S.Ct. 729, 74 L.Ed.2d 953 (1983). In that case, respondent unsuccessfully raised certain U.S.-Canadian treaties as a defense to enforcement of § 337. The Commission observed:

¹⁵ This case differs from *Viscofan S.A. v. U.S. International Trade Commission*, 787 F.2d 544, 552, 229 USPQ 118, 124 (Fed.Cir.1986), because here (but not in *Viscofan*) the confidentiality problem was directly related to the propriety of the exclusion order. Accordingly, we have reviewed the merits of the confidentiality actions. See *American Telephone and Telegraph Co. v. U.S. International Trade Commission*, 626 F.2d 841, 842, 206 USPQ 111, 112 (CCPA 1980).

Section 337 does not discriminate against foreign corporations by virtue of their foreign status. It applies to foreign and domestic corporations alike. Section 337 gives the Commission jurisdiction over products imported from a foreign country, *even if they are manufactured and/or imported by a U.S. corporation*. The Commission's jurisdiction lies in unfair acts occurring in connection with the importation of goods into the United States or their sale, and it extends to all persons engaged in such unfair acts.

216 USPQ at 231 (emphasis added).

IV.

Other Issues

In this part we consider four separate issues raised by appellants: (1) whether the Commission properly found that continued importation of Akzo's product would substantially injure or tend to injure Du Pont; (2) whether adjudication of § 337 actions by a non-Article III tribunal is unlawful; (3) whether Du Pont's pricing practices (with respect to its aramid products) violate the antitrust laws; and (4) whether Du Pont committed inequitable conduct in infringing Akzo's own patent.

A. Tendency to destroy or substantially injure

The ALJ concluded (and we have upheld) that Akzo violated § 337(a) by the unlawful importation or sale of certain aramid fibers produced in the Netherlands by means of a process which if practiced in the United States would infringe the Blades '756 patent. Such acts, long considered to be violative of § 337, clearly constitute unfair acts for the purpose of the statute. *See, e.g., In re Chain Door Locks*, USITC Pub. No. 770 (Apr. 1976), 191 USPQ 272 (USITC 1976); *In re Von Clemm*, 229 F.2d 441, 108 USPQ 371 (CCPA 1955); *In re Amtorg Trading Corp.*, 75 F.2d 826, 24 USPQ 315 (CCPA), *cert. denied*, 296 U.S. 576, 56 S.Ct. 102, 80 L.Ed. 407 (1935).

However, unfair acts, without more, are legally insufficient to support a finding of a § 337 violation. That provision declares unlawful “[u]nfair methods of competition and unfair acts in the importation of articles . . . , the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States.” Thus, to prove a violation of § 337, the complainant must show both an unfair act and a resulting detrimental effect or tendency. *New England Butt Co. v. U.S. International Trade Commission*, 756 F.2d 874, 876, 225 USPQ 260, 261 (Fed. Cir.1985). As this court recently held in *Textron, Inc. v. U.S. International Trade Commission*, 753 F.2d 1019, 224 USPQ 625 (Fed.Cir.1985), “section 337 has consistently been interpreted to contain a distinct injury requirement of independent proof.” 753 F.2d at 1028, 224 USPQ at 631 (citations omitted); accord *Corning Glass Works v. U.S. International Trade Commission*, 799 F.2d 1559, 230 USPQ 822 (Fed.Cir.1986); *Warner Brothers, Inc. v. U.S. International Trade Commission*, 787 F.2d 562, 564, 229 USPQ 126, 127 (Fed.Cir.1986).

According to *Textron*, “Congress may well have included this separate requirement . . . to insure that the extreme and internationally provocative remedy contemplated [by § 337]—exclusion of imports from particular countries—would be implemented only when this is compelled by strong economic reasons.” 753 F.2d at 1028-29, 224 USPQ at 631 (citations omitted). It follows that the mere concurrence of an unfair act and some resulting injury is not necessarily sufficient, in itself, to establish a violation of § 337. “Congress has directed that the remedy of section 337, involving as it does the act of the sovereign in closing our borders to certain imports, be exercised only in those instances where at least there is proof of a tendency to *substantially* injure the subject industry.” *Corning Glass Works v. U.S. International Trade Commission*, 799 F.2d 1559, 1567, 230 USPQ 822, 827 (Fed.Cir.1986) (emphasis in original).

Not only is an injury determination intimately wed to the particular facts of each case, but also the determination of injury is precisely the type of question which Congress has committed to the expertise of the Commission. Thus, on appeal, our review of an injury determination is limited to deciding whether the Commission's decision is supported by substantial evidence. 19 U.S.C. § 1337(c) (1982); 5 U.S.C. § 706 (1982); *SSIH Equipment S.A. v. U.S. International Trade Commission*, 718 F.2d 365, 371, 218 USPQ 678, 684 (Fed.Cir.1983); *General Motors Corp. v. U.S. International Trade Commission*, 687 F.2d 476, 215 USPQ 484 (CCPA 1982); *cert. denied*, 459 U.S. 1105, 103 S.Ct. 729, 74 L.Ed.2d 953 (1983). In other words, we must decide "whether substantial evidence supports the facts relied on and whether the Commissioner's [sic] determination, on the record, is arbitrary, capricious, or an abuse of discretion." *Corning Glass Works*, 799 F.2d at 1568, 230 USPQ at 828. As we noted in *Corning Glass Works*, "the question of quantum of injury is not one on which it would be appropriate for this court to put forth a legal standard." *Id.* Nor are we allowed to substitute our own judgment for that of the Commission. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 823, 28 L.Ed.2d 136 (1971). Of course, a decision is supported by substantial evidence if it is supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S.Ct. 206, 216, 83 L.Ed. 126 (1938).

Our review of the record in this case compels the conclusion that the Commission's determination—that Akzo's unfair imports of aramid fibers will have a tendency to injure Du Pont substantially—is supported by substantial evidence. The Commission based its injury determination on a prediction of the future effect of Akzo's unfair imports on the domestic industry. There is substantial support for this determination. The record reflects Akzo's intent and capacity to enter the United States aramid fibers market, Du Pont's resulting loss of revenue, and a probable price reduction by Du Pont in response to

Akzo's entry into the United States market. Nonetheless, Akzo urges this court to overturn the Commission's exclusion order and deny relief to Du Pont. Akzo first contends that its projected share of the U.S. market during the remaining life of the '756 patent is *de minimus*. It would be both unwise and improper for this court to establish some arbitrary marketshare benchmark as a prerequisite to a finding of a § 337 violation and we decline to do so. It is sufficient that the record supports the Commission's conclusion that, upon entry into the U.S. market, Akzo will capture a significant share of the domestic market, if not in relative percentage figures than certainly in absolute dollar figures.

Second, Akzo maintains that, notwithstanding its entry into the market, Du Pont's aramid fibers sales volume, revenues and profits will all increase during the remaining life of the patent. But Akzo mischaracterizes the proper standard for measuring injury. The issue is not whether Du Pont's sales, revenues and profits will increase beyond their 1985 levels but rather whether Akzo's presence in the market will substantially injure Du Pont's business during the 1986-1990 period (the remaining life of the Blades '756 patent).

As Du Pont correctly points out, nothing in § 337 requires a showing that the domestic industry will be utterly deprived of profitability. "Where the unfair practice is the importation of products that infringe a domestic industry's . . . patent right, even a relatively small loss of sales may establish, under section 337(a), the requisite injury. . . ." *Bally/Midway Mfg. Co. v. U.S. International Trade Commission*, 714 F.2d 1117, 1124, 219 USPQ 97, 102 (Fed.Cir.1983). This proposition is entirely consistent with the legislative history of § 337. In a House Report discussing the application of § 337 to unfair competition involving patent infringement, Congress stated: "Where unfair methods and acts have resulted in *conceivable losses of sales*, a tendency to substantially injure such industry has been established." See House Comm. on Ways and Means, Trade Reform Act of 1973, H.R.Rep. No. 571, 93d Cong. 1st Sess.

78 (1973) (emphasis added); accord *In re Von Clemm*, 229 F.2d 441, 445, 108 USPQ 371, 374 (CCPA 1955).

Because substantial evidence supports the facts relied upon by the Commission in making its determination that Akzo's unfair imports would tend to injure Du Pont substantially, we must affirm its injury determination. Akzo has failed to demonstrate that the Commission's determination is arbitrary, capricious, or an abuse of discretion.

A contrary result would emasculate the protections of § 337 with respect to high technology ventures. Typically, in high technology industries, acute competition forces competitors to commit substantial resources to research and development in hopes of generating profits before either their patents expire or before technological advance makes the products obsolete. Thus, innovators frequently resign themselves to losses during the early life of their patents with the expectation that, if product development and marketing efforts are successful, profits earned during the later life of their patents will provide sufficient compensation for their endeavors.

On this record, Du Pont's aramid fibers industry can be said to furnish a classic illustration. Although Du Pont has undertaken extensive product development and marketing efforts since 1973, the company had not earned any return on its investment through 1984. Du Pont anticipates that it will realize its first positive net operating earnings from its aramid fibers production in 1985.

In reaching its injury determination, the Commission permissibly recognized that the aramid fibers industry is in transition from a period requiring extremely high investment of resources to a period when the industry will finally realize a return on that investment. In these circumstances, diminished profits, lower return on investment, and reduced sales are all indicative of substantial injury.

B. Adjudication of § 337 actions by a non-Article III tribunal.

Apparently employing the "kitchen sink" or "let's try anything" approach to appellate advocacy, Akzo raises an additional challenge to the Commission's proceedings. Relying primarily on *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982). Akzo characterizes the current § 337 proceedings as "inherently judicial" involving "essentially private rights" and concludes that the Constitution requires adjudication of § 337 issues by Article III courts. Both Akzo's premise and conclusion are flawed. Although it is true that private rights may be affected by § 337 determinations, the thrust of the statute is directed toward the protection of the public interest from unfair trade practices in international commerce. As this court recognized in *Young Engineers, Inc. v. U.S. International Trade Commission*, 721 F.2d 1305, 1315, 219 USPQ 1142, 1152 (Fed.Cir.1983), a § 337 proceeding "is not purely private litigation 'between the parties' but rather is an 'investigation' by the Government into unfair methods of competition or unfair acts in the importation of articles into the United States." Moreover, "[t]he power to regulate commerce with foreign nations is expressly conferred upon Congress, and being an enumerated power is complete in itself, acknowledging no limitations other than those prescribed in the Constitution." *Buttfield v. Stranahan*, 192 U.S. 470, 492, 24 S.Ct. 349, 353, 48 L.Ed. 525 (1904). Properly viewed, § 337 and its predecessor provisions represent a valid delegation of this broad Congressional power for the public purpose of providing an adequate remedy for domestic industries against unfair practices beginning abroad and culminating in importation. *Sealed Air Corp. v. U.S. International Trade Commission*, 645 F.2d 976, 985-86, 209 USPQ 469, 478 (CCPA 1981).

C. Du Pont's pricing practices.

Under Du Pont's value-in-use pricing program, the price at which Du Pont sells aramid fibers varies in accordance with the particular end-use to which the purchaser puts the product. Although Du Pont's customers may use the aramid fibers for whatever purpose they desire, they are required to pay Du Pont the price appropriate to the ultimate end-use. To that objective, Du Pont requires its customers to agree that they will use the aramid fibers for the specific end-use for which they are purchased or, if the aramid fibers are put to a different end-use or are resold, that they will pay Du Pont an amount representing the difference between the initial purchase price and the price for the ultimate end-use.

According to Akzo, each such agreement constitutes a "contract . . . in restraint of trade," and the entire pattern of agreements, policing and surveillance constitutes a "combination . . . in restraint of trade" within the meaning of § 1 of the Sherman Act. Although the Commission specifically found that "the adoption of Du Pont's value-in-use pricing strategy reflects price competition with other substitute products for various end uses," Akzo continues to argue that Du Pont's value-in-use pricing for aramid fibers violates the antitrust laws.

Plainly, value-in-use pricing is not *per se* an anticompetitive restraint on trade within the meaning of the antitrust laws. In *Carter-Wallace, Inc. v. United States*, 449 F.2d 1374, 171 USPQ 359 (Ct.Cl.1971), one of this court's predecessor courts sustained against an antitrust challenge a pricing system in which purchasers paid a lower price for the drug meprobamate when used in certain combination drugs. The court noted that "the vendee firms, if one looks at their business as a whole, are not prohibited or deterred from making any use they wish of the meprobamate." *Id.* at 1379, 171 USPQ at 362. Moreover, "[i]t is even reasonable to assume, nothing else appearing, that if the vendees change their minds after purchasing the drug at the lower price they can make unrestricted use of it by paying

the difference between that lower price and the consent-decree price." *Id.* at 1379 n. 4, 171 USPQ at 362 n. 4.

Similarly, under Du Pont's value-in use pricing system, its customers may use their aramid fibers for whatever purpose they desire, including resale, providing they pay Du Pont the price appropriate to the ultimate end-use. Contrary to Akzo's position that Du Pont's pricing system is anticompetitive and an unreasonable restriction on use and resale, the Commission found and the record establishes that Du Pont's value-in-use pricing has the procompetitive effect of increasing the volume of aramid fibers that are sold.

Akzo also claims that the ALJ erred in not making specific findings on market definition. But, as this court recently observed, the trier of fact need not engage in the meaningless exercise of market definition where no wrongful conduct has been shown. *Loctite Corp. v. Ultraseal Ltd.*, 781 F.2d 861, 875, 228 USPQ 90, 100 (Fed.Cir.1985). Equally groundless is Akzo's contention that the ALJ erred by not shifting to Du Pont the burden of demonstrating that its pricing policies had procompetitive effects. The Supreme Court, in *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984), made abundantly clear that the burden of proof shifts only where the evidence shows that the challenged practice has the "hallmarks of anticompetitive behavior," namely, that "it has operated to raise prices and reduce output." *Id.* at 113, 104 S.Ct. at 2967. Conversely, in this case, the evidence establishes and the Commission found that the alleged "restraint," value-in-use pricing, results in reduced prices and increased output.

D. Du Pont's alleged inequitable conduct in manufacture

During the proceedings below, Akzo asserted that Du Pont infringed Akzo's U.S. patent 4,308,374 ('374 patent) on a polymerization solvent system used in the formulation of the polymer which is spun into aramid fibers by means of the Blades '756 process. Notwithstanding § 337(c) of the Tariff Act

of 1930 which provides that "[a]ll legal and equitable defenses may be presented," the ALJ struck Akzo's equitable defense and refused to hear the underlying evidence. On appeal, Akzo contends that the ALJ thus denied Akzo the opportunity to establish a meritorious defense to Du Pont's § 337 claim. For two reasons we disagree that this defense was meritorious.

Our conclusion is first supported by the recent decision of the District Court for the Eastern District of Virginia holding the '374 patent invalid for obviousness under 35 U.S.C. § 103. *Akzo N.V. v. E.I. DuPont de Nemours & Co.*, 635 F.Supp. 1336 (E.D.Va.1986), on appeal to this court, No. 86-1327/1358.¹⁶ Under that decision, Akzo's infringement claim has been adversely decided and Du Pont has a legal right to do the act claimed to be infringing. Consequently, there is as yet no legitimate basis for Akzo's equitable defense. See *Young Engineers, Inc. v. U.S. International Trade Commission*, 721 F.2d 1305, 1315-16, 219 USPQ 1142, 1152 (Fed.Cir.1983). Second, this same result is compelled in this instance by this court's decision in *SSIH Equipment S.A. v. U.S. International Trade Commission*, 718 F.2d 365, 218 USPQ 678 (Fed.Cir.1983). In *SSIH*, we held that allegedly "inequitable conduct" is not a defense to a § 337 action where the conduct occurred after issuance of the complainant's patent and involved a different patent. *Id.* at 378-79, 218 USPQ at 689-90. In this case, Du Pont's '756 patent was issued in 1973 and pertains to a spinning process; Akzo's '374 patent was issued in 1981 and pertains to a polymerization process.

¹⁶ That appeal was argued on November 7, 1986 before the same panel of judges as heard the current appeal.

Conclusion

For these reasons, we affirm the Commission's exclusion order prohibiting the importation into the United States of aramid fibers manufactured by Akzo in the Netherlands.

AFFIRMED.

APPENDIX B

CHAPTER IV

The first part of the chapter is devoted to a discussion of the various methods of determining the rate of reaction. The second part is devoted to a discussion of the various factors which influence the rate of reaction.

APPENDIX I

**ORDERS ISSUED BY
THE ADMINISTRATIVE LAW JUDGE**

UNITED STATES
INTERNATIONAL TRADE COMMISSION
Washington, D.C.
Investigation No. 337-TA-194

In the Matter of
CERTAIN ARAMID FIBER

ORDER NO. 2: *Protective Order*

WHEREAS, documents and information may be sought, produced or exhibited by and among the parties to the above captioned proceeding, which materials relate to trade secrets or other confidential research, development or commercial information, as such terms are used in the Commission's Rules, 19 C.F.R. Section 210.30(d)(7)(1976).

IT IS HEREBY ORDERED THAT:

1. Confidential business information is information which has not been made public and which concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the production, sales, shipments, purchases, transfers, identification of customers, inventories, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or other organization, the disclosure of which information is likely to have the effect of either (1) impairing the Commission's ability to obtain such information as is necessary to perform its statutory functions, or (2) causing substantial harm to the competitive position of the person, firm, partnership, corporation, or other organization from which

the information was obtained, unless the Commission is required by law to disclose such information.

2. Any information submitted, either voluntarily or pursuant to order, in this investigation, which is asserted by a supplier to contain or constitute confidential business information, shall be so designated by such supplier in writing, or orally at a deposition, conference or hearing, and shall be segregated from other information being submitted. Documents shall be clearly and prominently marked on their face with the legend: "[supplier's name] CONFIDENTIAL BUSINESS INFORMATION, SUBJECT TO PROTECTIVE ORDER," or a comparable notice. Such information whether submitted in writing or in oral testimony shall be disclosed at any hearing only *in camera* before the Commission or the administrative law judge.

3. In the absence of written permission from the supplier or an order by the Commission or the administrative law judge, any confidential documents or business information submitted in accordance with the provisions of paragraph 2 above shall not be disclosed to any person other than: (i) outside counsel for parties to this investigation, including necessary secretarial and clerical personnel assisting such counsel, (ii) qualified persons taking testimony involving such documents or information and necessary stenographic and clerical personnel thereof, (iii) technical experts and their staff who are employed for the purposes of this litigation (unless they are otherwise employed by, consultants to, or otherwise affiliated with a non-governmental party, or are employees of any domestic or foreign manufacturer, wholesaler, retailer, or distributor of CERTAIN ARAMID FIBERS which are the subject of this investigation), and (iv) the Commission, the administrative law judge, the Commission staff, and personnel of any governmental agency as authorized by the Commission.

4. Confidential business information submitted in accordance with the provisions of paragraph 2 above shall not be made available to any person designated in paragraph 3(i) and (iii) unless he or she shall have first read this order and shall have agreed, by letter filed with the Secretary of this Commission: (i) to be bound by the terms thereof; (ii) not to reveal such confidential business information to anyone other than another person designated in paragraph 3; and (iii) to utilize such confidential business information solely for purposes of this investigation.

5. If the Commission or the administrative law judge orders, or if the supplier and all parties to the investigation agree, that access to, or dissemination of, information submitted as confidential business information shall be made to persons not included in paragraph 3 above, such matter shall only be accessible to, or disseminated to, such persons based upon the conditions pertaining to, and obligations arising from, this order, and such persons shall be considered subject to it, unless the Commission or the administrative law judge finds that the information is not confidential business information as defined in paragraph 1 hereof.

6. Any confidential business information submitted to the Commission or the administrative law judge in connection with a motion or other proceeding within the purview of this investigation shall be submitted under seal pursuant to paragraph 2 above. Any portion of a transcript in connection with this investigation containing any confidential business information submitted pursuant to paragraph 2 above shall be bound separately and filed under seal. When any confidential business information submitted in accordance with paragraph 2 above is included in an authorized transcript of a deposition or exhibits thereto, arrangements shall be made with the court reporter taking the deposition to bind such confidential portions and separately label them "[supplier's name], CONFIDENTIAL BUSINESS INFORMATION, SUBJECT TO PROTECTIVE

ORDER." Before a court reporter receives any such information, he or she shall have first read this order and shall have agreed in writing to be bound by the terms thereof. Alternatively, he or she shall sign the agreement included as Attachment A hereto. Copies of each such signed agreement shall be provided to the supplier of such confidential business information and the Secretary of the Commission.

7. The restrictions upon, and obligations accruing to, persons who become subject to this order shall not apply to any information submitted in accordance with paragraph 2 above to which the person asserting the confidential status thereof agrees in writing, or the Commission or the administrative law judge rules, after proper notice and hearing, was publicly known at the time it was supplied to the receiving party or has since become publicly known through no fault of the receiving party.

8. The Commission, the administrative law judge, and the Commission investigative attorney acknowledge that any document or information submitted as confidential business information pursuant to paragraph 2 above is to be treated as such within the meaning of 5 U.S.C. 552(b)(4) and 18 U.S.C. 1905, subject to a challenge by any party pursuant to paragraph 10 below or to a final ruling, after notice, by the Commission, the Administrative Law Judge, or its Freedom of Information Act Officer to the contrary, or by appeal of such a ruling, interlocutory or otherwise.

9. The Commission, the administrative law judge, and the Commission investigative attorney shall take all necessary and proper steps to preserve the confidentiality of, and to protect each supplier's rights with respect to, any confidential business information designated by the supplier in accordance with paragraph 2 above, including, without limitation, (a) notifying the supplier promptly of: (i) any inquiry or request by anyone for the substance of or access to such confidential business information, other than

those authorized pursuant to this order, under the Freedom of Information Act, as amended (5 U.S.C. 552), and (ii) any proposal to declassify or make public any such confidential business information; and (b) providing the supplier at least seven days after receipt of such inquiry or request within which to take action before the Commission, its Freedom of Information Act Officer, or the administrative law judge, or otherwise to preserve the confidentiality of and to protect its rights in, and to, such confidential business information.

10. If a party to this order who is to be a recipient of any business information designated as confidential, and submitted in accordance with paragraph 2, disagrees with respect to such a designation, in full or in part, it shall notify the supplier in writing, and they will thereupon confer as to the status of the subject information proffered within the context of this order. If prior to, or at the time of such a conference, the supplier withdraws its designation of such information as being subject to this order, but nonetheless submits such information for purposes of the investigation, such supplier shall express the withdrawal, in writing, and serve such withdrawal upon all parties and the Commission, or the administrative law judge, and the Commission investigative attorney. If the recipient and supplier are unable to concur upon the status of the subject information submitted as confidential business information within ten days from the date of notification of such disagreement, any party to this order may raise the issue of the designation of such a status to the Commission or the administrative law judge who shall consider the issue. The Commission or the administrative law judge may raise the issue of designation of the confidential status without any request from a party.

11. No less than ten days (or any other period of time designated by the administrative law judge) prior to the initial disclosure to the proposed expert of any confidential information submitted in accordance with paragraph 2, the

party proposing to use such expert shall submit in writing the name of such proposed expert and his or her educational and employment history to the supplier. If the supplier objects to the disclosure of such confidential business information to such proposed expert as inconsistent with the language or intent of this order or on other grounds, it shall notify the recipient in writing of its objection and the grounds therefor prior to the initial disclosure. If the dispute is not resolved on an informal basis within ten days of receipt of such notice of objections, the supplier shall submit immediately each objection to the Commission or the administrative law judge for a ruling. The submission of such confidential business information to such proposed expert shall be withheld pending the ruling of the Commission or the administrative law judge. The terms of this paragraph shall be inapplicable to experts within the Commission or to experts from other governmental agencies who are consulted with or used by the Commission.

12. If confidential business information submitted in accordance with paragraph 2 is disclosed to any person other than in the manner authorized by this protective order, the party responsible for the disclosure must immediately bring all pertinent facts relating to such disclosure to the attention of the supplier and the administrative law judge and, without prejudice to other rights and remedies of the supplier, make every effort to prevent further disclosure by it or by the person who was the recipient of such information.

13. Nothing in this order shall abridge the right of any person to seek judicial review or to pursue other appropriate judicial action with respect to any ruling made by the Commission, its Freedom of Information Act Officer, or the administrative law judge concerning the issue of the status of confidential business information.

14. Upon final termination of this investigation, each party that is subject to this order shall assemble and return to the supplier all items containing confidential business information submitted in accordance with paragraph 2 above, including all copies of such matter which may have been made, but not including copies containing notes or other attorney's work product that may have been placed thereon by counsel for the receiving party. All copies containing notes or other attorney's work product shall be destroyed. Receipt of material returned to the supplier shall be acknowledged in writing. This paragraph shall not apply to the Commission, including its investigative attorney, and the administrative law judge, which shall retain such material pursuant to statutory requirements and for other recordkeeping purposes, but may destroy those additional copies in its possession which it regards as surplusage.

15. If any confidential business information which is supplied in accordance with paragraph 2 above is supplied by a nonparty to this investigation, such a nonparty shall be considered a "supplier" within the meaning of that term as it is used in the context of this order.

16. The Secretary shall serve a copy of this order upon all parties.

S/S _____
Paul J. Luckern
Administrative Law Judge

Issued: May 21, 1984.

UNITED STATES
INTERNATIONAL TRADE COMMISSION
Washington, D.C.
Investigation No. 337-TA-194

In the Matter of
CERTAIN ARAMID FIBER

ORDER NO. 7: *Order Denying Respondents' Motion to
Modify The Protective Order*

At the Preliminary Conference of June 22, 1984, respondents Akzona Incorporated, Akzo N.V., Aramide Maatschappij v.o.f. and Enka B.V. (hereafter "Akhzona") orally moved to modify the Protective Order that issued in this investigation (Order No. 2, May 21, 1984). It was argued that there is a substantial overlap between this investigation and an action in the United States District Court, District of Delaware, commenced by respondents Enka B.V., Aramide Maatschappij v.o.f. and Akzona Incorporated against complainant, E.I. duPont de Nemours & Company (hereafter "DuPont"), Civil Action No. 84-10 (MMS) (hereafter "Delaware action"). Akzona contends that because a protective order has issued in the Delaware action, it makes "no sense to have the very same documents under two different protective orders, and that it would facilitate things to align the protective orders so that we have essentially the same protective order in this proceeding as was agreed to in Delaware by both sides and so ordered by the court." Hearing Tr. at 45.

DuPont, at the conference, considered Order No. 2 appropriate. Hearing Tr. at 46.

By letter dated June 27, 1984, Akzona requested that paragraph 3 of Order No. 2 be amended to add three specifically identified in-house counsel for the Dutch respondents. In addition, it was believed appropriate to add a designated representative of DuPont's legal staff and also the General Counsel of Akzona Incorporated.

DuPont, by its letter dated June 27, 1984, opposed Akzona's request relying on *Certain Rotary Wheel Printers*, Inv. No. 337-TA-145, 5 ITRD 1933 (Nov. 4, 1983) (hereafter "*Rotary Wheel Printers*").

The Commission investigative attorney (hereafter "Staff Attorney") opposed Akzona's request to the extent that DuPont "submits information that is relevant only to this investigation that qualifies as confidential business information under the ITC protective order." The Staff Attorney urged that Akzona has not demonstrated the requisite need to enable in-house counsel to submit to the protective order in this investigation. It was pointed out that the staff was aware of no instance in 337 investigations in which in-house counsel have been permitted to subscribe to a protective order absent an agreement among the parties.

Based on the present record, the Presiding Officer agrees that Akzona has not demonstrated the requisite need to enable in-house counsel to submit to Order No. 2.

The Commission, in *Rotary Wheel Printers*, left no doubt that, as a matter of fundamental policy, it favors protection of confidentiality. Thus, it stated:

Protection of confidential information is crucial to the Commission's ability to carry out its statutory responsibilities. In addition review after discovery and the evidentiary hearing are completed would provide an inadequate remedy. The inappropriate release of confidential information can never be fully remedied. *The Commission has traditionally been reluctant to release confidential infor-*

mation where not absolutely necessary . . . (Emphasis added).

5 ITRD at 1935. As to in-house counsel, in section 337 investigations, the Commission stated that "it is the exception rather than the rule to release confidential information to in-house counsel". *Id.* Recognizing a possible conflict with concurrent district court orders, the Commission stated:

in-house counsel had been granted access to confidential information only where the other parties had agreed to such disclosure, or *where in-house counsel already had access to the same information under a concurrent district court order* (citations omitted) (Emphasis added).

Id. Referring to the *per se* proscription of access to confidential information by in-house counsel in Title VII (antidumping and countervailing duty) investigations, the Commission concluded that justification exists for a standard for granting access to in-house counsel in 337 investigations approaching that of the *per se* rule. Specifically, the Commission cited as justification its dependence "on the voluntary submission of information to be able to fulfill its statutory responsibilities within the strict statutory time limits" and the broad scope of the information released to opposing counsel, which it concluded, was even greater than in Title VII investigations. *Id.*

Nevertheless, the Commission has "adopted a balancing test which allows in-house counsel access to confidential information only in extraordinary circumstances and under the close supervision of the ALJ." *Id.* Specifically, the Commission has set forth the following tests:

Where access to confidential information is sought for in-house counsel, the need that must be established is that the party seeking access has 'no other reasonable way of adequately preparing and presenting its arguments' in the absence of such access. If this is not shown there is no need to go further. (Citations omitted).

5 ITRD at 1937.

The Presiding Officer recognizes that the Commission, in *Rotary Wheel Printers*, at footnote 26, in support of the above test, relied on *United States Steel Corp. v. United States*, 569 F. Supp. 870; 4 ITRD 2447 (Ct. Int'l Trade, July 22, 1983) (hereafter "*United States Steel*") and *Republic Steel Corp. v. United States*, 572 F. Supp. 275 (Ct. Int'l Trade, 1983). Akzona, in a letter dated June 29, 1984, argued that DuPont, in citing *Rotary Wheel Printers* had conveniently managed to ignore the fact that the United States Court of Appeals for the Federal Circuit in *United States Steel Corp. v. United States*, 730 F.2d 1465 (C.A.F.C. 1984) (hereafter "*United States Steel appeal*") vacated *United States Steel*

and specifically rejected the validity of the very assumptions advanced by the Commission to justify its conclusions with respect to "harm" in *Certain Rotary Wheel Printers*. The Court of Appeals directly held that "status as in-house counsel cannot alone create the probability of serious risk to confidentiality and cannot therefore serve as the sole basis for denial of access" (730 F.2d at 1469). It is "error to deny access solely because of in-house counsel's 'general position' and 'reasonable assumptions' regarding the status and role of in-house counsel (730 F.2d at 1466)."

Akzona letter of June 29, 1984 at 2-3. Significantly, however, the C.A.F.C. in *United States Steel appeal* made it clear that it did not reject the validity of the assumptions of the Commission in *Rotary Wheel Printers* as those assumptions apply to 337 investigations. Thus, Chief Judge Markey, writing for the majority, stated:

Our decision here bears no relation to, and can have no effect on, ITC's rule establishing a *per se* ban on disclosure to in-house counsel in its administrative proceedings. That rule in [sic] not before the court. The policy of an administrative agency faced with specific tasks and deadlines cannot of course control a trial court's discretion in managing the litigation before it. Congress has granted

discretion to control access to confidential information in cases like the present, to the CIT [Court of International Trade]. Whether the exercise of that discretion in the course of litigation would unacceptably "chill" the willingness to disclose such information at the administrative level is a matter for the Congress.

730 F.2d at 1468

Moreover, as pointed out by DuPont in a letter dated July 3, 1984, Administrative Law Judge Mathias, in this forum, in *Certain Rotary Wheel Printers*, Inv. No. 337-TA-185, rejected the applicability of the *United States Steel* appeal decision to a protective order issued by the Commission in a 337 investigation. Judge Mathias, stating that the Federal Circuit in *United States Steel* appeal had "made an important distinction between proceedings before a court as opposed to an administrative agency and [had] placed particular emphasis on the factual situation presented to it . . ." concluded "that the Court's ruling in *U.S. Steel* is inapplicable to the present investigation" (opinion of April 25, 1984 at 2). In addition, Judge Mathias observed that the Court in *United States Steel* appeal noted that "the U.S. Steel litigation was extremely complex and at an advanced stage, that the Court of International Trade had accepted in-house counsel's 'divorcement from competitive decision making', and that forcing U.S. Steel to rely on newly retained counsel would create an extreme and unnecessary hardship." *Id.* at 3. While Akzona stated in a letter, dated July 5, 1984, that it is prepared to supply affidavits establishing that the in-house counsel concerned do not function "as businessmen or give business advice", this investigation is not at an advanced stage. Moreover, such affidavits would not meet the test set forth in *Rotary Wheel Printers*, 5 I.T.R.D. at 1937.

Akzona stated in its letter dated June 27, 1984 that this investigation concerns a new product and industry whose technology and marketing applications are not familiar to its outside counsel or other persons not affiliated with one of the parties, and that there are serious obstacles in communicating

with and advising the foreign clients without the assistance of the in-house counsel who are most familiar with the facts of the case and are fluent in Dutch. Such rationale also does not meet the test set forth by the Commission in *Rotary Wheel Printers*, I.T.R.D. at 1937. It is not unusual that 337 investigations entail dealing with foreign corporations or foreign language documents. Hence, accepting Akzona's rationale, the general rule would be to permit in-house counsel access to confidential documents in 337 investigations, a rule inconsistent with the prevailing policy of the Commission. Akzona is represented in this investigation by four competent outside law firms and it would appear that some of these law firms at least would have had to have some familiarity with the technology of this investigation since before October 12, 1983 when respondents Enka B.V., Aramide Maatschappij v.o.f. and Akzona Incorporated sued complainant DuPont in the United States District Court, Western District of North Carolina which action was transferred to the District of Delaware (the Delaware action).

Akzona stated in its June 29, 1984 letter that in the Delaware action DuPont has gone so far as to mark indiscriminately as "confidential" a map of the Netherlands and newspaper and magazine articles, and that what DuPont is attempting to do is to insulate "all of its documents" from review by Akzona's expert in-house lawyers. Obviously, the Protective Order that has issued in this investigation does not intend such a result. Rather, the Protective Order is to protect only *confidential* information released under the order and, in fact, provides for the removal of the confidential designation in appropriate circumstances under ¶ 10. It is the Commission's policy that the integrity of a protective order should be maintained (*Certain Amorphous Metal Alloys and Amorphous Metal Parters*, Inv. No. 337-TA-143 (Commission Opinion following Commission's Action and Order Issued July 22, 1983)). However, where Akzona's in-house counsel under the concurrent district court order has access to information which DuPont has designated confidential under the protective order in this inves-

tigation, ¶ 10 of the Protective Order provides adequate means for removal of the confidential designation.

Finally, Akzona has relied on *Doe v. District of Columbia*, 697 F.2d 1115 (D.C. Cir. 1983) in which the Court of Appeals quotes its prior decision of in *In Re Halkin*, 598 F.2d 176 (D.C. Cir. 1979). *Doe* however is distinguishable on its facts. Rather than involving an administrative 337 investigation, *Doe* was a class action brought by prison inmates challenging conditions of their confinement. In *Doe*, the Court of Appeals found that a protective order designed to prevent facts revealed, or allegations made in the course of discovery, from entering the prison grapevine sharply curtailed the ability of appellants' counsel to discuss with their clients information obtained during discovery. Significantly, even in *Doe* the Court of Appeals made it very clear that it did not intend its decision to prohibit a protective order issued to prevent disclosure to a party's business competitor of trade secrets, development or commercial information, or other confidential records. This was conclusively shown when, in making reference to such disclosure, the Court of Appeals stated:

Indeed, when serious harm to a party . . . cannot be avoided without either forbidding discovery altogether or curtailing communication between one of the litigants and his attorney regarding discovered materials, the court should issue . . . a protective order.

697 F.2d at 1120.

Accordingly, on the present record, Akzona's oral motion to modify the Protective Order that issued in this investigation on May 21, 1984 (Order No. 2) is denied.

S/S _____

Paul J. Luckern
Administrative Law Judge

Issued: July 6, 1984

UNITED STATES
INTERNATIONAL TRADE COMMISSION
Washington, D.C.
Investigation No. 337-TA-194

In the Matter of
CERTAIN ARAMID FIBERS

Order No. 40: *Order Denying Respondents' Motion to Modify
The Protective Order*

On February 8, 1985, respondents Akzo N.V., Enka B.V., Aramide Maatschappij v.o.f. and Akzona Incorporated (respondents) moved for an Order pursuant to Order No. 2, which issued on May 21, 1984, to modify the confidential designation of four witness statements submitted by complainant E. I. Du Pont de Nemours & Company (Du Pont) and the exhibits referred to therein so as to permit access by respondents' in-house counsel Carel Aalders, Esq. and management representative Mr. Dirk Broekmeyer, subject to their adherence to Order No. 2 (Motion Docket No. 194-65). It was argued that without such limited access, respondents cannot properly and adequately assist in their own defense.

Respondents stated that they offered to enter into a reciprocal agreement with Du Pont with regard to an inside attorney and management representative from Du Pont and that Du Pont rejected this proposal on February 5, 1985.

Du Pont in a response dated February 12, 1985 opposed respondents' motion.

Respondents argued that as a matter of fundamental fairness and due process, respondents are entitled to know Du Pont's case against them in order to assist in their own defense; that permitting Messrs. Aalders and Broekmeyer to have access to

Du Pont's witness statements and related exhibits subject to the terms of the protective order will minimize disruptions of the trial and is consistent with the admonition of Order No. 18 (Dec. 21, 1984) for the parties to "re-assess the confidentiality of documents . . . prior to their offer into evidence at the hearing."

Respondents further argued that in designating as confidential large portions of its witness statements and related exhibits, Du Pont is attempting to shield its factual contentions from the scrutiny of those best able to refute them; that Du Pont is abusing the protective order by designating as confidential information plainly beyond the order's intended scope.

Referring to Order No. 7 which denied an early request of respondents to modify the protective order, respondents argued that their present motion is narrower and more urgent than their motion involved in Order No. 7; that respondents must now defend themselves against the affirmative case put forth by an adversary who has hailed them before a foreign tribunal; that respondents ask only that the specifics of Du Pont's arguments be disclosed, subject to the terms of the protective order, to two designated representatives of respondents in order to enable them to assist in their own defense; that in no case cited during the arguments leading to the issuance of Order No. 7 (dealing with pre-trial discovery documents) did a court deprive a defendant of its [sic] the right to know the evidence against it. It is argued that "both the interest of the litigant in securing adequate representation and the interest of the public in 'the fair administration of justice . . . [support] the right of every litigant to participate in the process whereby justice is done—to understand and become involved in the proceeding, not to be compelled passively to await its outcome'. *Doe v. District of Columbia*, 697 F.2d 1115, 1119-20 (D.C. Cir. 1983). See also Michelman, *Formal and Associational Aims in Procedural Due Process*, XVIII *Nomos* 126 (1977) and L. Tribe, *American Constitutional Law* 502-03 (1978)."

Respondents argued that the due process right to participate in one's own defense is particularly essential where, as in this investigation, the parties to the action are competitors in a new and unique product market and no outsider can fully address the technical issues in question; that competitive and otherwise confidential business information must be disclosed where a party would be unable "to meaningfully challenge" the case against it without the information. Respondents further argued that *In re Certain Rotary Wheel Printers*, 5 ITRD 1933 (ITC 1983), cited in Order No. 7, is not apposite here because in that case, not only was the complainant rather than the respondent seeking disclosure, but disclosure of all pre-trial discovery was sought and in-house counsel "conceded that adequate representation was possible without in-house counsel access to confidential information," *id.* at 1939; that respondents here make no such concession and that to the contrary respondents' right to defend themselves will be seriously jeopardized unless Messrs. Aalders and Broekmeyer are allowed to evaluate Du Pont's case in light of their special expertise, which outside counsel cannot duplicate.

Du Pont in opposing the motion argued that *Rotary Wheel Printers*, as Order No. 7 recognized, reflects this Commission's "fundamental policy" favoring "protection of confidentiality" (Order No. 7, p. 2); that a party seeking access to confidential information by its in-house counsel must establish that there is "no other reasonable way of adequately preparing and presenting its arguments" in the absence of such access." *Id.* at 3, quoting *Rotary Wheel Printers*, 5 ITRD at 1937; and, referring to 5 ITRD at 1937, that a party may not—as respondents have done here—merely assert a need for such access; that it must demonstrate that need clearly and convincingly with supporting evidence.

Du Pont further argued that respondents' motion papers do not begin to discharge the heavy burden of justification required by the Commission and Order No. 7; that respondents' efforts to distinguish *Rotary Wheel Printers* are equally unavailing because they provide no good reason for their sugges-

tion that the policy of confidentiality should be applied only where the complainant (rather than the respondent) seeks disclosure. It is said that respondents' refusal to concede the obvious—that they are receiving adequate legal representation from the battery of lawyers and experts they have engaged—does not release them from their obligation to demonstrate an urgent need for access by corporate insiders to Du Pont's confidential information.

Du Pont also argued that respondents' motion is "narrower" only because Du Pont has already declassified most of the pertinent materials; that respondents' renewed motion focuses directly on gaining insider access to those remaining portions of the witness statements and associated exhibits that Du Pont considers to be most confidential. It is further argued that the fact that the insider access sought by respondents is to confidential information contained in witness statements does not raise an issue different from that decided in Order No. 7; that the policy of *Rotary Wheel Printers*—and the heavy burden of justification it establishes—applies to any and all confidential information; that respondents have made no genuine effort to demonstrate the extraordinary need for access required for the access they seek. It is argued that none of the cases on which respondents rely involved an ITC proceeding; that as to those cases, Order No. 7 (p. 7) rightly distinguished *Doe v. District of Columbia*, 697 F.2d 1115 (D.C. Cir. 1983), as involving no confidential commercial information; that the moving party in *Katunich v. Donovan*, 576 F. Supp. 636 (Ct. Int'l Trade, 1983) was not a competitor of the third parties whose confidential information was sought; that in *American Spring Wire Corp. v. United States*, 566 F. Supp. 1538 (Ct. Int'l Trade, 1983), the data sought was compiled by the Government—the restriction of access to outside counsel and experts was not raised or considered.

Du Pont argued that the evidence in this investigation amply shows the vigorous competition between Du Pont and respondents in a number of arenas—technological, production, marketing and legal; that only the guarantee that its confidential

business information will be protected from competitors' corporate insiders makes it possible for companies like Du Pont to seek relief under Section 337 and that that is especially so in this investigation where Du Pont is already in the market and the newly-entering respondents stand to benefit handsomely from learning all they can about all aspects of the business. It is argued that the Commission's strong policy against disclosure to in-house counsel is a vital protection; that in-house counsel are, in the final analysis, employees of a competitor; that they report to those who make the business decisions; that the protection is all the more important where the in-house counsel is a foreign lawyer, far from the reach of this country's laws, and not an officer of the courts and agencies of the United States. With respect to Mr. Broekmeyer, as respondents' General Manager for Industrial Fibers, it is said he has supervisory responsibility for the production and marketing of Twaron (RX-8, pp. 1-2; CX-78, p. 13); that it would be impossible for him to fence off in his mind the confidential information acquired in this case in order to ignore it while acting in his business capacity; that business decisions would inevitably rest, at least in part, upon the knowledge gained from the confidential materials.

As set down in Order No. 18 which issued December 21, 1984, the hearing in this investigation commenced on February 11, 1985.

On February 13, 1985, the Administrative Law Judge requested DuPont to make sure there was nothing that it could declassify (Tr. 264). The staff considered respondents' motion unwarranted in view of Order No. 7. It was said that while there "may be a few instances" in which DuPont overclassified, those few instances do not justify wholesale disclosure of sensitive DuPont confidential business information relating to the Kevlar operations, especially when one of the persons to whom the information is to be disclosed is a key management strategist (Prehearing Tr. 265-266). Respondents' counsel argued that its motion is very limited. The position of DuPont's

counsel was that the "chaff has been blown away. They are [now] limiting it just to the goodies" (Prehearing Tr. 270).

On February 14, 1985, respondents' counsel argued that Commission Rule 201.6 requires a showing that there will be substantial harm to the competitive position of a company claiming confidential business information under a protective order (Tr. 346). It was argued that no substantial competitive harm is involved in permitting access to a prediction of future prices for a product (Tr. 352-353). DuPont in turn argued that future figures are based on present confidential knowledge (Tr. 352-353). DuPont was urged by the Administrative Law Judge to review its designation of confidential matter (Tr. 354-355).

A letter dated February 15, 1985 from DuPont's counsel declassified certain material that had been designated confidential. Additional argument was had on the motion on February 15. Respondents' counsel made reference to the proceedings before the Federal Trade Commission and argued that there the policy as to release of business information is just the opposite to what it is in this investigation (Tr. 413, 427-428). DuPont's counsel argued the special role of the International Trade Commission (Tr. 424); that what DuPont is offering against the respondents is fully known to their "very able counsel and to their experts" (Tr. 429-430). The Commission investigative attorney did not consider that a situation is presented in which respondents are being deprived of due process; that while the International Trade Commission (ITC) may at times look to the Federal Trade Commission for guidance, the ITC has its own rules.

On February 16, 1985, respondents identified the following materials that they still want declassified (Tr. 1178).

Exhibit

CX-149

Identification -

"Kevlar" Aramid Fiber 1984 Alternate Strategy Focus Forecast with ITC Protection in the U.S., No Patent Effect

<i>Exhibit</i>	<i>Identification</i>
CX-157	"Kevlar" Alternate Strategy Study, 1984, Case November 1, "Kevlar" Venture Economics (October 30, 1984)
CX-177	DuPont 1984 Alternate Strategy Focus Forecast-Domestic (October 19, 1984)
CX-182	Tables of "Kevlar" Cost Data (March 20, 1984) and Experience Curve Data (Sept. 19, 1983), prepared by DuPont employee
CX-183	Computer Print-Out, "Kevlar" Cost Data and Forecasts, prepared by DuPont employee (October 30, 1984)
CX-201	Computer Print-Out, "Kevlar" Cost Data and Forecasts, prepared by DuPont employee (November 2, 1984)
CX-210	Summary of 1984 Alternate Strategy Focus Forecast, Worldwide and Domestic, prepared by DuPont employee (October 19, 1984)
CX-217	"Kevlar" Aramid Fiber 1984 Alternate Strategy Focus Forecast (October 19, 1984)
CX-219	DuPont Profits Forecast 1985-1990, prepared by Dr. Jerry A. Hausman
CX-226	DuPont Injury: Simplified Calculation 1986-1990, prepared by Dr. Jerry A. Hausman
CX-649	1984 Alternate Strategy Base Case Forecast, Akzo Percentage Shown by End Use, United States. Prepared by DuPont employee
RX-751	Undated Report entitled Kevlar Aramid Fibers No. 1-1984 Marketing Forecast (2003399-2003420)

<i>Exhibit</i>	<i>Identification</i>
RX-4006	1984 Alternate Strategy Forecast, Akzo Shipments, No ITC Action, No Patent Effect, United States, Volume By End-Use
RX-4007	Kevlar Aramid Fibers 1984 Alternate Strategy Focus Forecast Including Akzo Impact, No Patent Effect, Domestic, Volume By End-Use
CX-133, including figures 3, 5, 7, 10-21	Testimony of Dr. Robert J. Thomas
CX-180, including tables 3.2, 4.1, 4.2, 4.3 and 4.4	Testimony of Dr. Jerry A. Hausman
CX-399, including table 2	Rebuttal testimony of Dr. Robert J. Thomas

In argument on February 16, respondents' counsel argued that the declassified matter received from DuPont is insignificant; that any of the declassified information that respondents have received has been the kind of information that really was so "arbitrarily classified" (Tr. 472). It was argued that the whole case, as far as the injury portion of it is concerned, is built on forecasts which are the product of the lawyers and outside experts working with their business people; that whether they have any validity at all can only be known if respondents' counsel "with the assistance of our client" have the opportunity to analyze them (Tr. 475-479). DuPont's counsel argued that as a result of respondents' motion significant amounts of material have been declassified (Tr. 479); that the forecasts are confidential because they are built upon a wealth of DuPont's confidential business knowledge and that its disclosure to a competitor would cause DuPont significant competitive disadvantage (Tr. 479).

At the hearing on February 16, counsel for DuPont and for respondents were given the opportunity to examine Charles L. Henry regarding the confidentiality of the documents in issue. Mr. Henry is a Vice President in the Textile Fiber Department of DuPont with responsibility for the Industrial Fibers Division which develops and executes business plans and strategies for "Kevlar" and for the Manufacturing Division which makes "Kevlar." "Kevlar" is in issue in this investigation. Mr. Henry testified to the following:

1. The information contained in the documents issue is sensitive business information based upon the knowledge and experience of DuPont employees. (Tr. 1132-11134)
2. The forecasts in issue give insight into the markets being targeted, which in turn can be used in framing product development work and determining where to devote additional studies, putting one in a better competitive position. (Tr. 1139, 1151-1154)
3. Forecasts may reveal a competitor's view of the market and where it will likely put its effort, whether it may not be going after a certain market or whether it considers that it cannot be successful in a particular market. (Tr. 1141, 1143-1144, 1155)

The principal purpose of the protective order is to promote the production of relevant information and probative evidence by protecting the parties from the risk of disclosure of business confidential information. The importance of protecting the informational integrity of this and future investigations, for the needs of this forum, must be considered. Respondents argue that as a matter of fundamental fairness and due process, a key management official of respondents and respondents' in-house counsel should have access to information which the record establishes is confidential business information, the disclosure of which to a competitor would cause substantial harm to DuPont's competitive position. To obtain such information respondents must clearly demonstrate a need

56a

for such evidence. On the record before me, that need has not been established.

Motion No. 194-65 is denied.

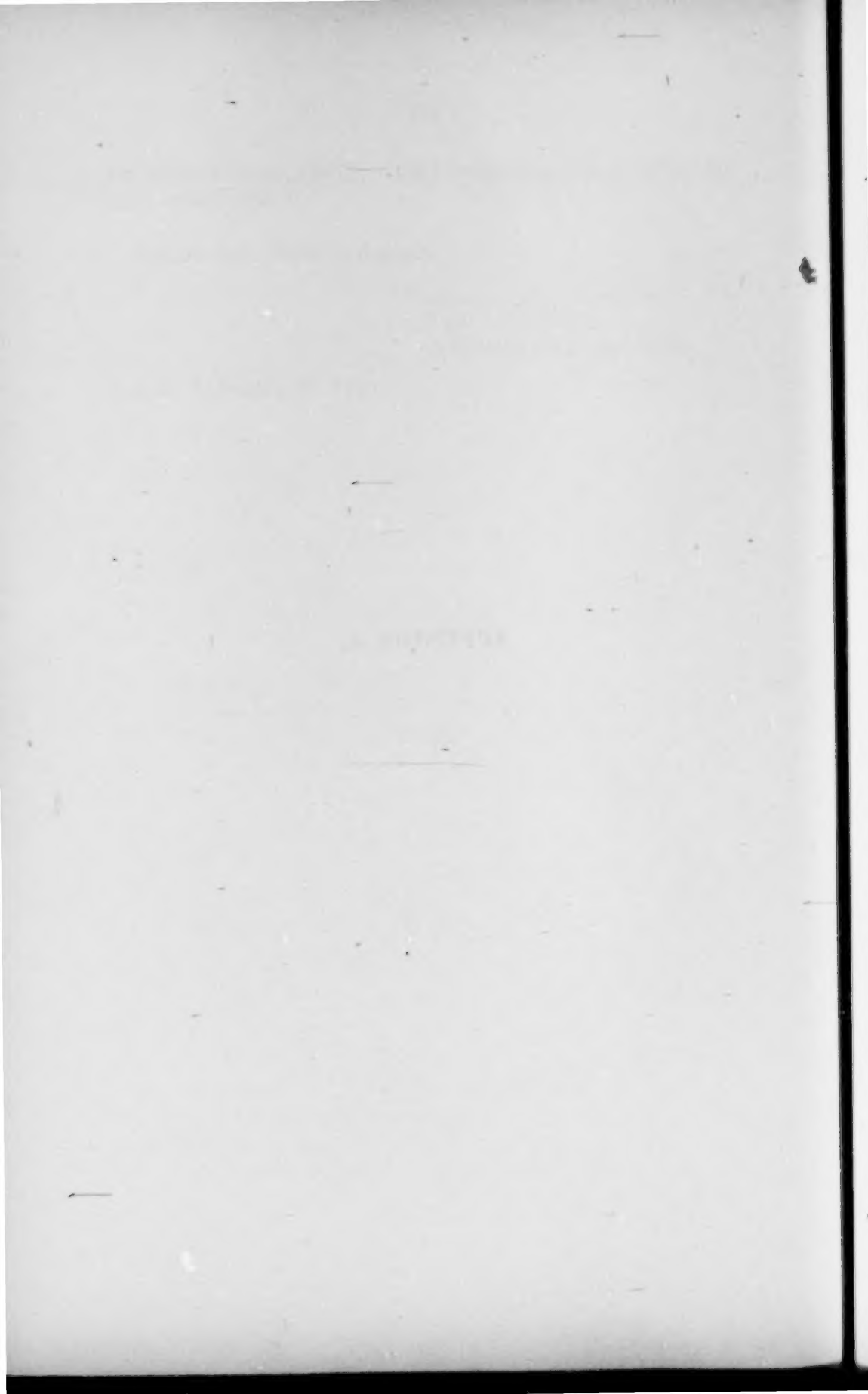
S/S _____

Paul J. Luckern

Administrative Law Judge

Issued: February 21, 1985

APPENDIX C



CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND LEGISLATIVE HISTORY

Constitutional Provisions

United States Constitution

Article III

SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Treaties

1. The General Agreement on Tariffs and Trade ("GATT"), 4 Bevans 639, 61 Stat. 5, T.I.A.S. No. 1700, signed for the United States October 30, 1947.

Article III(2)

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that

accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

2. The Treaty of Friendship, Commerce and Navigation Between the United States and The Netherlands, March 27, 1956, 8 U.S.T. 2043, T.I.A.S. No. 3942, entered into force December 5, 1957.

Article V(1)

Nationals and companies of either Party shall be accorded national treatment with respect to access to the courts of justice and to administrative tribunals and agencies within the territories of the other Party, in all degrees of jurisdiction, both in pursuit and in defense of their rights. It is understood that companies of either Party not engaged in activities within the territories of the other Party shall enjoy such access therein without any requirement of registration or domestication.

Article XVI

1. Products of either Party shall be accorded, within the territories of the other Party, national treatment and most-favored-nation treatment in all matters affecting internal taxation, sale, distribution, storage and use.

2. Articles produced by nationals and companies of either Party within the territories of the other Party, or by companies of the latter Party controlled by such nationals and companies, shall be accorded therein treatment no less favorable than that accorded to like articles of national origin by whatever person or company produced, in all matters affecting exportation, taxation, sale, distribution, storage and use.

Article XVII

1. Each Party undertakes (a) that enterprises owned or controlled by its Government, and that monopolies or agencies granted exclusive or special privileges within its territories, shall make their purchases and sales involving either imports or exports affecting the commerce of the other Party solely in accordance with commercial considerations, including price, quality, availability marketability, transportation and other conditions of purchase or sale; and (b) that the nationals, companies and commerce of such other Party shall be afforded adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases and sales.

2. Each Party shall accord to the nationals, companies and commerce of the other Party fair and equitable treatment, as compared with that accorded to the nationals, companies and commerce of any third country, with respect to: (a) the governmental purchase of supplies; (b) the awarding of concessions and other government contracts; and (c) the sale of any service sold by the Government or by any monopoly or agency granted exclusive or special privileges.

Statutes

Administrative Procedure Act, 5 U.S.C. § 555.

(b) A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding. So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the representation, adjustment, or determination of an issue, request, or controversy in a

proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function. . . .

Administrative Procedure Act 5 U.S.C. § 556.

Hearings; presiding employees;
powers and duties; burden of proof;
evidence; record as basis of decision

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence—

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more administrative law judges appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may—

(1) administer oaths and affirmations;

(2) issue subpoenas authorized by law;

(3) rule on offers of proof and receive relevant evidence;

(4) take depositions or have depositions taken when the ends of justice would be served;

(5) regulate the course of the hearing;

(6) hold conferences for the settlement or simplification of the issues by consent of the parties;

(7) dispose of procedural requests or similar matters;

(8) make or recommend decisions in accordance with section 557 of this title; and

(9) take other action authorized by agency rule consistent with this subchapter.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for

the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

Administrative Procedure Act, 5 U.S.C. § 557.

Initial decisions; conclusiveness;
review by agency; submissions by parties;
contents of decisions; record

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to pre-

side at hearings pursuant to section 556 of this title shall first recommend a decision, except that in rule making or determining applications for initial licenses—

(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

(d)(1) In any agency proceeding which is subject to subsection (a) of this section, except to the extent required

for the disposition of ex parte matters as authorized by law—

(A) no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relevant to the merits of the proceeding;

(B) no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to any interested person outside the agency an ex parte communication relevant to the merits of the proceeding;

(C) a member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding who receives, or who makes or knowingly causes to be made, a communication prohibited by this subsection shall place on the public record of the proceeding:

(i) all such written communications;

(ii) memoranda stating the substance of all such oral communications; and

(iii) all written responses, and memoranda stating the substance of all oral responses, to the materials described in clauses (i) and (ii) of this subparagraph;

(D) upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this subsection, the agency, administrative law judge, or other employee presiding at the hearing may, to the extent consistent with the inter-

ests of justice and the policy of the underlying statutes, require the party to show cause why this claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation; and

(E) the prohibitions of this subsection shall apply beginning at such time as the agency may designate, but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge.

(2) This subsection does not constitute authority to withhold information from Congress.

19 U.S.C. § 1337 (Tariff Act of 1930). Unfair practices in import trade

(a) Unfair methods of competition declared unlawful

Unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States, are declared unlawful, and when found by the Commission to exist shall be dealt with, in addition to any other provisions of law, as provided in this section.

(b)(1) Investigation of violations by Commission;
time limits

The Commission shall investigate any alleged violation of this section on complaint under oath or upon its initiative. Upon commencing any such investigation, the

Commission shall publish notice thereof in the Federal Register. The Commission shall conclude any such investigation, and make its determination under this section, at the earliest practicable time, but not later than one year (18 months in more complicated cases) after the date of publication of notice of such investigation. The Commission shall publish in the Federal Register its reasons for designating any investigation as a more complicated investigation. For purposes of the one-year and 18-month periods prescribed by this subsection, there shall be excluded any period of time during which such investigation is suspended because of proceedings in a court or agency of the United States involving similar questions concerning the subject matter of such investigation.

. . . .

(c) Determinations; review

The Commission shall determine, with respect to each investigation conducted by it under this section, whether or not there is a violation of this section. Each determination under subsection (d) or (e) of this section shall be made on the record after notice and opportunity for a hearing in conformity with the provisions of subchapter II of chapter 5 of title 5. All legal and equitable defenses may be presented in all cases. Any person adversely affected by a final determination of the Commission under subsection (d), (e), or (f) of this section may appeal such determination, within 60 days after the determination becomes final, to the United States Court of Appeals for the Federal Circuit for review in accordance with chapter 7 of Title 5. Notwithstanding the foregoing provisions of this subsection, Commission determinations under subsections (d), (e), and (f) of this section with respect to its findings on the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, the amount and

nature of bond, or the appropriate remedy shall be reviewable in accordance with section 706 of title 5.

(d) Exclusion of articles from entry

If the Commission determines, as a result of an investigation under this section, that there is violation of this section, it shall direct that the articles concerned, imported by any person violating the provision of this section, be excluded from entry into the United States, unless, after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such articles should not be excluded from entry. The Commission shall notify the Secretary of the Treasury of its action under this subsection directing such exclusion from entry, and upon receipt of such notice, the Secretary shall, through the proper officers, refuse such entry.

. . . .

(g)(1) If the Commission determines that there is a violation of this section, or that, for purposes of subsection (e) of this section, there is reason to believe that there is such a violation, it shall—

(A) publish such determination in the Federal Register, and

(B) transmit to the President a copy of such determination and the action taken under subsection (d), (e), or (f) of this section, with respect thereto, together with the record upon which such determination is based.

(2) If, before the close of the 60-day period beginning on the day after the day on which he receives a copy of such determination, the President, for policy reasons, disapproves such determination and notifies the Commission of his disapproval, then, effective on the date of such

notice, such determination and the action taken under subsection (d), (e), or (f) of this section with respect thereto shall have no force or effect.

(3) Subject to the provisions of paragraph (2), such determination shall, except for purposes of subsection (c) of this section, be effective upon publication thereof in the Federal Register, and the action taken under subsection (d), (e), or (f) of this section with respect thereto shall be effective as provided in such subsections, except that articles directed to be excluded from entry under subsection (d) of this section or subject to a cease and desist order under subsection (f) of this section shall be entitled to entry under bond determined by the Commission and prescribed by the Secretary until such determination becomes final.

(4) If the President does not disapprove such determination within such 60-day period, or if he notifies the Commission before the close of such period that he approves such determination, then, for purposes of paragraph (3) and subsection (c) of this section such determination shall become final on the day after the close of such period or the day on which the President notifies the Commission of his approval, as the case may be.

(h) Period of effectiveness

Except as provided in subsections (f) and (g) of this section, any exclusion from entry or order under this section shall continue in effect until the Commission finds, and in the case of exclusion from entry notifies the Secretary of the Treasury, that the conditions which led to such exclusion from entry or order no longer exist.

. . . .

19 U.S.C. § 1337a. Importation of products produced under process covered by claims of unexpired patent

The importation for use, sale, or exchange of a product made, produced, processed, or mined under or by means of a process covered by the claims of any unexpired valid United States letters patent, shall have the same status for the purposes of section 1337 of this title as the importation of any product or article covered by the claims of any unexpired valid United States letters patent.

Rules

International Trade Commission

19 C.F.R. § 210.30 (Superseded on November 23, 1984).

(d) *Protective orders.* Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the presiding officer may make any order which may appear necessary and appropriate for the protection of the public interest or which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

. . . .

(7) That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;. . . .

19 C.F.R. § 210.37 (effective Nov. 23, 1984). Protective orders.

(a) *Issuance of protective order.* Upon motion by a party or by the person from whom discovery is sought or by the administrative law judge on his own initiative, and for good cause shown, the administrative law judge may

make any order which may appear necessary and appropriate for the protection of the public interest or which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

. . . .

(7) That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;. . . .

19 C.F.R. § 210.44. In camera treatment of confidential information.

(a) *Definition.* Except as hereinafter provided and consistent with § 210.37 of this part, documents and testimony made subject to in camera orders are not made a part of the public record, but are kept confidential in an in camera record, and only counsel before the Commission, authorized Commission personnel, other Government personnel authorized by the Commission, and court personnel concerned with judicial review shall have access thereto. The right of the administrative law judge, the Commission, and reviewing courts to disclose in camera data to the extent necessary for the proper disposition of the proceeding is specifically reserved.

Federal Rules of Evidence

Rule 615. Exclusion of Witnesses

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

Legislative History

S. Rep. No. 1298, 93d Cong., 2d Sess. 195 (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News 7186, 7328:

Section 337(c) of the Act, as amended by the Committee, would require that the Commission determine whether there is a violation of this section in each investigation it conducts. Both determinations of whether section 337 is being violated and whether there is reason to believe that there is a violation of this section would be required to be made by the Commission on the record after notice and opportunity for a full hearing in conformity with the provisions of subchapter II of chapter 5 of title 5 of the United States Code. The full hearing required would be a full "due process" hearing, with the Commission of course being able to impose reasonable restraints on the time to be devoted to such hearings.

Section 337(c) of the Act, as amended, would now also provide that the Commission accept and consider, in reaching its findings, evidence regarding all legal and equitable defenses

President's Message To Congress on the Trade Reform Act of 1973 in House Comm. on Ways and Means, 93d Cong., 1st Sess., Materials on Administration Proposal Entitled "Trade Reform Act of 1973" 11-12 (Comm. Print 1973):

To cope with unfair competitive practices in our own markets, my proposed legislation would amend our anti-dumping and countervailing duty laws to provide for more expeditious investigations and decisions. It would make a number of procedural and other changes in these laws to guarantee their effective operation. The bill would also amend the current statute concerning patent infringement by subjecting cases involving imports to judicial proceedings similar to those which involve domestic infringement, and by-providing for fair processes and effec-

tive action in the event of court delays. I also propose that the Federal Trade Commission Act be amended to strengthen our ability to deal with foreign producers whose cartel or monopoly practices raise prices in our market or otherwise harm our interest by restraining trade.

H.R. Rep. No. 571, 93d Cong., 1st Sess. 79 (1973):

Commission proceedings and actions would be based upon a full hearing on a record, bringing these provisions into accord with the provisions of subchapter II of chapter 5 of title 5 of the United States Code.



2
No. 86-1519

Supreme Court, U.S.
FILED

MAY 11 1986

JOSEPH F. STANNOL JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

AKZO N.V., ENKA B.V., ARAMIDE MAATSCHAPPIJ v.o.f.,
and AKZONA INCORPORATED,

Petitioners,

v.

U.S. INTERNATIONAL TRADE COMMISSION and
E.I. DU PONT DE NEMOURS & COMPANY,

Respondents.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Federal Circuit

**BRIEF IN OPPOSITION FOR RESPONDENT
E.I. DU PONT DE NEMOURS & COMPANY**

JOSEPH M. FITZPATRICK
FITZPATRICK, CELLA,
HARPER & SCINTO
277 Park Avenue
New York, New York 10172
(212) 758-2400

DANIEL M. GRIBBON *
HARRIS WEINSTEIN
EUGENE D. GULLAND
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

May 1987

* Counsel of Record

QUESTIONS PRESENTED

After finding that petitioners' unlicensed use in The Netherlands of a manufacturing process invented and patented by E.I. Du Pont de Nemours & Co. ("Du Pont") constitutes an unlawful and unfair act which threatens to destroy or substantially injure the domestic U.S. aramid fiber industry created by Du Pont, the U.S. International Trade Commission ("ITC") entered an order pursuant to Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, excluding imports of aramid fiber manufactured by petitioners. The questions presented, which are limited to the legitimacy and procedures of the ITC, are:

1. Whether petitioners were denied due process of law by ITC procedures protecting both petitioners' and Du Pont's trade secret/confidential business information from disclosure to each other's employees where (i) more than 90 of petitioners' non-employee representatives (legal counsel and consultants) had full access to all of Du Pont's protected information; (ii) petitioners did not invoke the ITC's dispute resolution procedure for challenging the designation of any information as "confidential"; and (iii) petitioners neither tendered evidence showing prejudice or need, nor countered sworn testimony that disclosure to their in-house counsel and marketing manager would seriously prejudice Du Pont.

2. Whether Section 337 delegates to the ITC judicial power that is reserved to courts under Article III of the Constitution notwithstanding that the exclusion of imports by the ITC under Section 337 is an exercise of delegated Congressional power to regulate foreign commerce that is subject to disapproval by the President and is not *res judicata* on patent issues.

3. Whether the ITC's procedures denied "national treatment" to petitioners' aramid fiber under the provisions of international agreements to which the United States and The Netherlands are parties.

(i)

STATEMENT PURSUANT TO RULE 28.1

Respondent E.I. Du Pont de Nemours & Company ("Du Pont") has the following publicly-held subsidiary or affiliated companies: Du Pont Canada, Inc.; Biotech Research Laboratories, Inc.; Molecular Biosystems Inc.; and Conoco Exploration Limited. Though it is not a subsidiary or affiliate of Du Pont, the Seagram Company, Ltd. (through wholly-owned subsidiary companies) owns approximately 22 percent of Du Pont's common stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
STATEMENT PURSUANT TO RULE 28.1	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
A. The Issues Before the ITC	2
B. The ITC's Protective Order	3
C. The ITC's Exclusion Order: Presidential and Judicial Review	6
REASONS FOR DENYING THE WRIT	7
I. PETITIONERS DISREGARD THE FACTS THAT UNDERMINE THEIR "DUE PROC- ESS" CLAIMS AND IDENTIFY NO CON- FLICT AMONG JUDICIAL DECISIONS.....	8
II. SECTION 337 DOES NOT DELEGATE TO THE ITC JUDICIAL POWER RESERVED TO THE COURTS UNDER ARTICLE III	13
III. THERE WAS NO DENIAL OF "NATIONAL TREATMENT" TO PETITIONERS' ARAMID FIBER	16
CONCLUSION	18

TABLE OF AUTHORITIES

Cases:	Page
<i>Abourezk v. Reagan</i> , 785 F.2d 1043 (D.C. Cir.), cert. granted, 107 S. Ct. 666 (1986)	12
<i>Akzo, N.V. v. E.I. Du Pont de Nemours & Co.</i> , 635 F. Supp. 1336 (E.D. Va. 1986), <i>aff'd</i> , 810 F.2d 1148 (Fed. Cir. 1987)	16
<i>Brown & Williamson Tobacco Corp. v. FTC</i> , 710 F.2d 1165 (6th Cir. 1983), <i>cert. denied</i> , 465 U.S. 1100 (1984)	13
<i>Buttfield v. Stranahan</i> , 192 U.S. 470 (1904)	14
<i>Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.</i> , 333 U.S. 103 (1948)	15
<i>Commodity Futures Trading Comm'n v. Schor</i> , 106 S. Ct. 3245 (1986)	15, 16
<i>Corning Glass Works v. USITC</i> , 799 F.2d 1559 (Fed. Cir. 1986)	15
<i>Doe v. District of Columbia</i> , 697 F.2d 1115 (D.C. Cir. 1983)	12
<i>Glidden Co. v. Zdanok</i> , 370 U.S. 530 (1962)	15
<i>Globe Newspaper Co. v. Superior Court</i> , 457 U.S. 596 (1982)	13
<i>Greene v. McElroy</i> , 360 U.S. 474 (1959)	12
<i>Helminski v. Ayerst Laboratories</i> , 766 F.2d 208 (6th Cir.), <i>cert. denied</i> , 106 S. Ct. 386 (1985)	12
<i>In Re Continental Illinois Securities Litigation</i> , 732 F.2d 1302 (7th Cir. 1984)	13
<i>In Re Japanese Electronic Products Antitrust Lit- igation</i> , 723 F.2d 319 (3d Cir. 1983)	17
<i>In Re San Juan Star Co.</i> , 662 F.2d 108 (1st Cir. 1981)	12
<i>Joy v. North</i> , 692 F.2d 880 (2d Cir. 1982), <i>cert. denied</i> , 460 U.S. 1051 (1983)	13
<i>Morgan v. United States</i> , 304 U.S. 1 (1938)	11, 12
<i>Ohio Bell Tel. Co. v. Public Utilities Comm'n</i> , 301 U.S. 292 (1937)	12
<i>Norwegian Nitrogen Products Co. v. United States</i> , 288 U.S. 294 (1933)	12
<i>Press-Enterprise Co. v. Superior Court</i> , 464 U.S. 501 (1984)	13
<i>Sealed Air Corp. v. USITC</i> , 645 F.2d 976 (CCPA 1981)	14

TABLE OF AUTHORITIES—Continued

	Page
<i>Thomas v. Union Carbide Agricultural Products Co.</i> , 473 U.S. 568 (1985).....	15
<i>Wilson v. American Motors Corp.</i> , 759 F.2d 1568 (11th Cir. 1985).....	13
<i>Young Engineers, Inc. v. USITC</i> , 721 F.2d 1305 (Fed. Cir. 1983)	14
<i>Administrative Decisions:</i>	
<i>Certain Rotary Wheel Printers</i> , 5 I.T.R.D. (BNA) 1933 (ITC 1983)	4, 5, 7, 9
<i>Certain Spring Assemblies and Components Thereof</i> , 216 USPQ 225 (ITC 1981), <i>aff'd sub nom. General Motors Corp. v. USITC</i> , 687 F.2d 476 (CCPA 1982), <i>cert. denied</i> , 459 U.S. 1105 (1983)	17
<i>International Decisions:</i>	
United States—Imports of Certain Automotive Spring Assemblies, GATT DISB, 30th Supp. (May 26, 1983)	17
<i>Legislative Materials:</i>	
S. Rep. No. 1298, 93d Cong., 2d Sess. 196 (1974) ..	13, 14, 15
<i>Statutes and Treaties:</i>	
Administrative Procedure Act	
5 U.S.C. § 555 (b)	13
5 U.S.C. § 706	6
Tariff Act of 1930, as amended	
§ 337, 19 U.S.C. § 1337	<i>passim</i>
§ 337a, 19 U.S.C. § 1337 (a)	<i>passim</i>
General Agreements on Tariffs and Trade (GATT), October 30, 1947, 4 Bevans 639, T.I.A.S. No. 1700	
	16, 17
Treaty of Friendship, Commerce and Navigation, between the United States and The Netherlands, 8 U.S.T. 2043, T.I.A.S. No. 3942 (1957)	
	16, 17
Treaty of Friendship, Commerce and Navigation, between the United States and Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863 (1953)	
	17



IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

AKZO N.V., ENKA B.V., ARAMIDE MAATSCHAPPIJ v.o.f.,
and AKZONA INCORPORATED,
Petitioners,

v.

U.S. INTERNATIONAL TRADE COMMISSION and
E.I. DU PONT DE NEMOURS & COMPANY,
Respondents.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Federal Circuit

**BRIEF IN OPPOSITION FOR RESPONDENT
E.I. DU PONT DE NEMOURS & COMPANY**

STATEMENT OF THE CASE

Petitioners attack an order issued by the ITC under Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, excluding from importation into the United States aramid fiber made by petitioners using a process patented by Du Pont. Section 337 prohibits "unfair acts in the importation of articles into the United States . . . the effect or tendency of which is to destroy or substantially injure" an efficient industry operating in the United States; it includes as an "unfair act" the importation of articles that, if manufactured within the United States, would infringe a U.S. process patent. Section 337a, 19 U.S.C. § 1337a.

Petitioners include the world's largest industrial fiber manufacturer, Enka, B.V., and its publicly-subsidized joint venture with the Dutch Government, Aramide Maatschappij v.o.f., which was organized to manufacture aramid fiber in The Netherlands for sale throughout the world.

A. The Issues Before the ITC.

On the basis of an extensive investigation which included evidentiary hearings before an administrative law judge ("ALJ") possessing a degree in chemistry and long experience as a patent lawyer,¹ the ITC found that petitioners were using a process for making aramid fiber that had been invented and patented in the United States by Du Pont. The ITC also found, as an element of petitioners' violation of Section 337, that imports of petitioners' aramid fiber into the United States threatened to "destroy or substantially injure" the domestic aramid fiber industry created by Du Pont in the United States.

The evidence detailed Du Pont's investment of more than half a billion dollars in research, development and manufacturing facilities over nearly 15 years to create and market the superstrong but lightweight fiber, which Du Pont markets under the name Kevlar®.² The ITC

¹ Petitioners took 83 depositions (71 of Du Pont personnel) generating more than 15,000 pages of transcript. They obtained access to more than 350,000 pages of Du Pont's business records through discovery, and submitted more than 50,000 pages of documentary exhibits at the hearings. Even though the parties' direct testimony was filed in written form weeks before the hearings, the hearings still consumed more than 14 trial days, 10 of which were devoted to cross-examination of Du Pont's witnesses. The hearing transcript exceeded 5,000 pages.

² Kevlar® is pound-for-pound five times stronger than steel and possesses unmatched resistance to heat and stretch. This "superfiber" is used in aerospace, military and other high-technology applications, as well as for asbestos replacement, bullet-protective apparel, ropes and cables, and automotive tires.

found that imports of petitioners' aramid fiber—timed to coincide with the growth of demand generated by Du Pont's efforts—would, over the remaining five-year life of Du Pont's process patent, cost Du Pont more than \$200 million in earnings that would otherwise help justify the heavy investment Du Pont made in reliance upon the effectiveness of its lawful U.S. patent rights. (J.A. 1106a.)

The ITC's determinations against petitioners on these issues, which are supported by extensive findings, are not challenged in this Court.³

B. The ITC's Protective Order.

The protective order that is the principal focus of the petition to this Court (*see* Pet. 33a-39a) was patterned upon orders frequently issued in Section 337 cases and in other complex proceedings. It permitted either party *initially* to designate qualifying trade secrets and competitively sensitive information as "confidential." Disclosure of such protected information was limited to the adversary's outside legal counsel, consultants, ITC personnel and authorized Government agencies. (*See* Pet. 34a-36a.) A party's initial designation of information as "confidential" was not conclusive. Paragraph 10 of the protective order enabled every party to object to any confidentiality designation, in which case the dispute would be promptly resolved by the ALJ or the ITC if the parties could not agree. (Pet. 37a.) Petitioners never invoked these procedures.

The protective order thus denied employees of both petitioners and Du Pont access to each other's trade secret/confidential business information.⁴ But more than

³ The ALJ's initial decision, which was adopted by the ITC, was 454 pages long and included 946 findings of fact. (J.A. 665a-1126a.)

⁴ Petitioners convey a misleading impression when they argue that 80 percent of Du Pont's evidence was "confidential." (Pet. 7.)

90 non-employee professionals that petitioners selected to represent them before the ITC had complete access to all Du Pont's information, no matter how competitively sensitive. These representatives included outside counsel, economic consultants and research assistants.

Petitioners sought to modify the protective order to authorize disclosure of Du Pont's confidential information to certain of their employees (*not* to declassify confidential materials). They persistently disregarded the ITC's requirement of an affidavit or other supporting evidence to show a need for such disclosure.⁵ Thus early in the proceeding, petitioners sought access to all Du Pont's confidential information for three in-house lawyers based in The Netherlands and one in the United States. Noting that numerous outside counsel and other representatives of petitioner already had access to this information (Pet. 45a), the ALJ concluded that petitioners had not estab-

They ignore that many of Du Pont's exhibits were "confidential" because they contained *petitioners'* confidential information. Moreover, their 80 percent computation categorizes as "confidential" every document containing any confidential information, while in most cases only a few words, sentences or paragraphs of a document were masked to conceal confidential portions. On this same misleading basis, 78 percent of petitioners' evidence was "confidential."

Similarly, the assertion that 80 percent of the oral hearing evidence was "confidential" ignores that, promptly after each day's hearing, the parties obtained a daily transcript and prepared a declassified version masking only the limited portions that were deemed confidential. Nor do petitioners disclose the fact that they frequently requested that the hearing room be cleared of Du Pont employees because of impending disclosures of petitioners' own confidential business information. (*See, e.g.*, J.A. 20426a, 20733a, 21331a-33a.)

⁵ The ITC's decision in *Certain Rotary Wheel Printers*, 5 I.T.R.D. (BNA) 1933, 1937 (ITC, 1983), requires such proof because "without evidence of the need for the access, there is nothing to weigh against the [adversary's] interests in maintaining confidentiality."

lished any "need" for employee access under the "balancing test" set forth in the ITC's decision in *Certain Rotary Wheel Printers*, 5 I.T.R.D. (BNA) 1933 (ITC 1983). (Pet. 42a.)

Then, on the eve of the evidentiary hearing, petitioners sought access to Du Pont's confidential information for their in-house Dutch counsel and for their senior marketing executive responsible for formulating competitive strategy against Du Pont. Petitioners' counsel focused upon especially sensitive documents revealing Du Pont's marketing plans, financial analyses and projections, and forecasts of sales, revenues and profits. (Pet. 52a-53a).⁶ In response to the ALJ's directive that the parties present evidence in support of their contentions (J.A. 19009a, 19110a, 19116a, 19999a), Du Pont put forward its key aramid fiber marketing executive, who testified as to the competitive harm Du Pont would suffer if this confidential information were disclosed to petitioners' employees. (J.A. 19942a-90a.) As before, petitioners presented no witness or affidavit showing any need for access by their inside management. Applying again the "balancing test" of *Certain Rotary Wheel Printers*, the

⁶ Du Pont's marketing studies and forecasts predicted over a period of years the costs, prices, and volume for each major use to which it was anticipated aramid fiber would be put (J.A. 20992a-20999a). They were based on extensive marketing research and would have been of substantial value to someone breaking into the aramid fiber market, such as petitioners' top marketing executive. These studies were performed wholly without knowledge of the similar marketing studies performed by petitioners, which petitioners designated "confidential" and offered in evidence. (J.A. 17371a, 17397a.)

Petitioners quibble with the court of appeals' correct observation that the information on patent issues was promptly declassified. (Pet. 20a.) The fact is that the direct testimony of Du Pont's inventor and other key witnesses was never classified to begin with, and hearing testimony was promptly declassified in accordance with procedures agreed upon by both parties. (See footnote 4.)

ALJ found that Du Pont's evidence had shown "substantial harm to [its] competitive position" from disclosure to petitioners' employees and that petitioners had not made any countervailing showing of need by their "key management official" and in-house counsel to learn this sensitive information. (Pet. 55a-56a).

C. The ITC's Exclusion Order:

Presidential and Judicial Review.

After receiving submissions from the parties and interested government agencies directed to the question whether an exclusion order or other remedy would accord with the public interest,⁷ the ITC entered a "limited exclusion order" against unlicensed imports of petitioners' aramid fiber made by the process invented and patented by Du Pont. (J.A. 1142a-1143a.) The President did not exercise his power to disapprove the exclusion order under Section 337(g)(2), 19 U.S.C. § 1337(g)(2), and it became effective on January 26, 1986.

Petitioners sought judicial review in the United States Court of Appeals for the Federal Circuit, alleging numerous errors. In a unanimous opinion, the court of appeals rejected each of petitioners' arguments. With respect to the contentions presented here, the court approved the protective order procedures employed by the ITC because Section 337 investigations involve business competitors; require the parties to divulge such competitively sensitive matters as anticipated sales, customers,

⁷ If the ITC determines in accordance with Section 337(a) that unfair acts threaten to destroy or substantially injure a domestic industry, the Commission is required by Section 337(d) to consider separately "the effect of such exclusion [of unfair imports] upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers . . ." 19 U.S.C. § 1337(d). The ITC's "remedy" determinations are reviewable only in accordance with the "arbitrary and capricious" standard of review set forth in 5 U.S.C. § 706. (See Pet. 66a-67a.)

pricing and marketing strategies in order to determine the magnitude of the threatened injury to the domestic industry; and demand prompt exchange of discovery and evidence in order to meet the tight deadlines imposed by Congress for completing the proceeding.⁸ (Pet. 18a-21a.) The court stressed the ITC's strong interest in confidentiality procedures that encourage prompt submission of data by assuring both domestic and foreign parties that their sensitive competitive information will be protected. (Pet. 19a.)⁹ It endorsed the ITC's confidential information "balancing test" as applied in this case (Pet. 19a.), noting that "more than 90 people representing [petitioners] had unrestricted access to Du Pont's confidential information" (Pet. 21a), and that petitioners had "never invoked the dispute resolution procedures of paragraph 10 to challenge Du Pont's characterization of business information as confidential." (Pet. 18a.) It concluded that petitioners had suffered no prejudice of any sort from the protective order procedures. (Pet. 21a.)

REASONS FOR DENYING THE WRIT

The petition presents no issue that warrants review by this Court. No aspect of the court of appeals' decision conflicts with a decision of another court of appeals or an applicable decision of this Court. No question is raised that is appropriate for consideration by this Court in the exercise of its supervisory power or otherwise. The issues presented are without substance

⁸ Section 337 cases must ordinarily be completed within one year of the ITC's decision to initiate an investigation. If the ITC designates a case as "more complicated," as it did in this proceeding, the investigation must be completed within 18 months. *See* Section 337(b)(1).

⁹ The ITC has determined that such confidentiality procedures are "crucial to the Commission's ability to carry out its statutory responsibilities." *Certain Rotary Wheel Printers, supra*, 5 I.T.R.D. at 1935.

and reflect collateral arguments raised by petitioners in an effort to avoid the consequences of their demonstrated misappropriation of Du Pont's patented invention.

I. PETITIONERS DISREGARD THE FACTS THAT UNDERMINE THEIR "DUE PROCESS" CLAIMS AND IDENTIFY NO CONFLICT AMONG JUDICIAL DECISIONS

Through disclosure of all Du Pont's confidential information to more than 90 attorneys, economic consultants and research assistants of their own selection, petitioners were made aware of every document and word of testimony before the ITC. Such disclosure to skilled professional representatives who were thoroughly conversant with the relevant facts and legal issues was of far greater value than disclosure to inside management with limited appreciation of the issues relevant to import relief under Section 337. Accordingly, petitioners' claim is at best wholly theoretical.¹⁰

Petitioners' inside management was denied access only to such confidential trade secret and business information as could be used in petitioners' worldwide competition against Du Pont. In every instance in which evidence or other information was withheld from petitioners' employees, (i) the competitive sensitivity of the information was established; and (ii) petitioners declined to present evidence of any need for disclosure, which left undisputed Du Pont's proof of the serious competitive harm that would result from disclosure to petitioners' additional management representatives.

In the court of appeals, as here, petitioners tried to obscure these facts in order to construct a "due process"

¹⁰ That petitioners' employees played a limited role in the ITC proceedings is shown by the fact that petitioners' principal economic witness found it unnecessary to consult them in the process of learning about the aramid fiber market and reaching the expert opinions offered in his testimony. (J.A. 5383a-94a.)

issue that is not genuinely tendered by the facts of this case. Petitioners contended below, in an argument that has been slightly reworded in the petition, that “under the terms of the protective order, the parties’ designation of materials as confidential had the effect of ‘unilaterally immunizing them from scrutiny by the opposing party.’” (Pet. 17a.) For reasons that are equally applicable here, the court of appeals found that “examination of the challenged protective order, as it was enforced, shows [petitioners’] charges to be groundless” in all respects (Pet. 17a).

Thus, the complaint that “confidential” designations conclusively “immunized” information lacking genuine competitive sensitivity (Pet. 6, 12, 14) foundered on petitioners’ failure to invoke the declassification procedures provided by the protective order. (Pet. 17a-18a.)¹¹ Similarly, the court of appeals rejected petitioners’ assertion that the ITC imposed an unduly heavy burden on requests to disclose confidential information to inside management (Pet. 14); in fact, the ITC applied a reasonable “three-part balancing test to determine whether, to whom, and under what conditions to release confidential information.” (Pet. 19a.)¹² The court of appeals also found that the ITC’s balancing test “cannot be faulted,”

¹¹ Petitioners misleadingly say that they followed the declassification procedures in one instance. (Pet. 16 n.20.) In fact, petitioners did not challenge the propriety of particular confidentiality designations under Paragraph 10 of the protective order, but instead demanded (as they do in this Court) wholesale disclosure of Du Pont’s most sensitive confidential evidence to petitioners’ in-house counsel and chief marketing strategist. (Pet. 47a.)

¹² Under this “three-part balancing test,” the ITC weighs “the need of the party seeking [inside management] access to the information to prepare its case adequately against the harm that disclosure would cause the party submitting the information and the interest of the Commission in maintaining confidentiality.” *Certain Rotary Wheel Printers, supra*, 5 I.T.R.D. at 1940.

because Du Pont had presented evidence showing competitive harm from such additional disclosure while petitioners failed to offer any proof of need for such access by "in-house counsel or key management officials." (Pet. 19a.)

The court of appeals independently concluded, moreover, that there were strong reasons for protecting Du Pont's confidential information from "a direct competitor like [petitioners]." (Pet. 20a.)¹³ With disclosure of all Du Pont's information to more than 90 of their non-employee representatives, petitioners had "failed to demonstrate that [they] suffered actual harm under the confidentiality procedures . . ." (Pet. 21a.) The court also stressed that petitioners' inside management offered its own confidential forecasts and marketing plans to challenge Du Pont's evidence, and petitioners accordingly had ample opportunity to present their own case without needing personal access by their executives to Du Pont's confidential business plans and forecasts. (Pet. 20a.) In this way, the ITC was able to compare each party's evidence, consider the testimony of expert witnesses who had access to all confidential information, weigh the cross-examination by the parties' representatives, and reach its own conclusions.

Petitioners' "due process" contentions are accordingly in conflict with the facts of this case. Having failed to invoke the dispute resolution procedures of paragraph 10 of the protective order to challenge the "confidential" designation of information, petitioners cannot now complain of overclassification. After deliberately declining to offer evidence in response to Du Pont's showing of competitive harm resulting from disclosure to petitioners' inside management, petitioners cannot "confidently pre-

¹³ The sensitivity of the competitive information in question was reinforced during the cross-examination of petitioners' top executive, who testified without qualification that petitioners would be seriously prejudiced by disclosure to Du Pont employees of petitioners' corresponding marketing information. (J.A. 20148a-49a.)

dict" that the ITC's "balancing test" imposed a burden that can never be satisfied "absent action by this Court." (Pet. 12.)¹⁴ And having never tried to show that it was not enough to disclose Du Pont's confidential information to 90 of their chosen representatives, petitioners cannot equate the denial of additional access by their inside management with cases in which a tribunal acts on the basis of "secret evidence" undisclosed to any representative of a party. (Pet. 16.)¹⁵

Petitioners unquestionably enjoyed the fundamental due process right: "a reasonable opportunity to know the claims of the opposing party and to meet them." *Morgan v. United States*, 304 U.S. 1, 18 (1938). The court of appeals correctly recognized that there is no judicial decision holding that "due process" requires the disclosure of confidential business information to a competitor's inside management. (Pet. 21a.) Petitioners do not identify any such authority. They cite cases in which *no* representative of a party, including its counsel and consultants, was

¹⁴ Petitioners repeatedly argue that the ITC required them to show that additional employee access was "absolutely necessary." (Pet. 11, 12, 14.) Petitioners lift this language, out of context, from the court of appeals' discussion. (Pet. 20a.) In fact, the ALJ did not apply an "absolutely necessary" standard, but held that petitioners failed to "clearly demonstrate a need" for additional inside management access to Du Pont's competitively sensitive information. (Pet. 55a.)

¹⁵ The petition argues that petitioners' outside counsel would have benefitted from discussing Du Pont's confidential information with petitioners' inside management. (Pet. 18.) But if there were any substance to that contention, petitioners should have offered an affidavit or testimony at the hearing in response to the ITC's requirement of supporting evidence. In fact, four of petitioners' employees—including the Marketing Manager for whom petitioners sought access to Du Pont's confidential information—testified at the hearings confidently and without qualification as to future marketing conditions and suggested no need to examine Du Pont's sensitive competitive data.

afforded access to the evidence.¹⁶ They quote language lifted out of context from other decisions that, in fact, reject the "absolute" right asserted by petitioners.¹⁷ And they also rely on cases recognizing the public's interest in the openness of judicial and administrative proceedings, while ignoring that (i) neither petitioners nor anyone else ever requested that *in camera* sessions of the ITC hearings be open to the public; and (ii) no one questioned the need to preserve the confidentiality of the sensitive business information revealed during those portions of the hearing that were *in camera*.¹⁸

¹⁶ *Ohio Bell Tel. Co. v. Public Utilities Comm'n*, 301 U.S. 292 (1937); *Morgan v. United States*, 304 U.S. 1 (1938); *Greene v. McElroy*, 360 U.S. 474 (1959); *see also* *Abourezk v. Reagan*, 785 F.2d 1043, 1060-61 (D.C. Cir.), *cert. granted*, 107 S. Ct. 666 (1986). Similarly, Justice Cardozo's opinion in *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294 (1933), commented upon Tariff Commission investigative procedures that denied counsel and all other representatives of a party access to evidence and other information before the Commission.

¹⁷ *Doe v. District of Columbia*, 697 F.2d 1115, 1120 (D.C. Cir. 1983), actually confirms the appropriateness of the kind of balancing analysis conducted by the ITC and recognizes that "when serious harm to a party" cannot be avoided, "the court should issue such a protective order." Similarly, *In Re San Juan Star Co.*, 662 F.2d 108 (1st Cir. 1981), approved the exclusion of litigants from depositions conducted by their counsel (*id.* at 111) and observed that "harm" to an adversary or some other "direct or material interest" could justify a limitation on counsel's discussing the depositions with his clients (*id.* at 118). And *Helminski v. Ayerst Laboratories*, 766 F.2d 208, 213 (6th Cir.), *cert. denied*, 106 S. Ct. 386 (1985), emphasizes that the due process clause does not give a "civil litigant the absolute right to be present personally" at a hearing, but may be satisfied "so long as the litigant is represented by counsel" and is not excluded "arbitrarily."

¹⁸ In each of the cases cited by petitioners, there was a timely request by a party or other person that the proceedings or written submissions be opened to the public. None of the cases holds that there is an absolute rule against preserving confidentiality; each endorses a case-by-case balancing analysis weighing the inter-

Since they possessed no constitutional right to disclose Du Pont's confidential business information to their inside management, petitioners can derive no superior right from the Administrative Procedure Act ("APA") or the 1974 amendments to Section 337. Petitioners agree that the APA codifies, rather than enlarges, the established due process standards. (Pet. 17 n.22.) Having received a "full due process hearing" under the governing constitutional principles, petitioners were accorded the procedural rights conferred by the APA and the 1974 amendments. (Pet. 17-18.) The court of appeals specifically considered this question and concluded that the ITC accorded petitioners their right under 5 U.S.C. § 555(b) "to appear in person or by or with counsel or other duly qualified representative in an agency proceeding." (Pet. 20a.) Petitioners again cite no decision to the contrary.

II. SECTION 337 DOES NOT DELEGATE TO THE ITC JUDICIAL POWER RESERVED TO THE COURTS UNDER ARTICLE III

Petitioners contend that the ITC acting under Section 337—particularly in adjudicating patent-related issues—exercised judicial power over "private rights" that is reserved to the courts by Article III, Section 1 of the Constitution. (Pet. 22.) The court of appeals rejected this

ests in confidentiality against those favoring disclosure. *See Joy v. North*, 692 F.2d 880 (2d Cir. 1982), *cert. denied*, 460 U.S. 1051 (1983); *In Re Continental Illinois Securities Litigation*, 782 F.2d 1302 (7th Cir. 1984); *Wilson v. American Motors Corp.*, 759 F.2d 1568 (11th Cir. 1985); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984). Such a case-by-case balancing analysis is even applied in criminal cases, in which this Court has recognized an especially strong presumption in favor of openness. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982).

argument (Pet. 28a) and petitioners have cited no judicial authority that conflicts with its decision.¹⁹

The court of appeals stressed that, although private rights may be affected by Section 337 investigations, such proceedings embody a "valid delegation" of Congress' power to regulate foreign commerce "for the public purpose of providing an adequate remedy for domestic industries against unfair practices beginning abroad and culminating in importation." (Pet. 28a.)²⁰ One need only read Section 337 and follow the course of this proceeding to see the extent to which public concerns predominate.²¹

It is ironic that the patent validity issues for which petitioners now demand an Article III tribunal are the *defenses* they themselves raised and litigated before the ITC. The Trade Act of 1974 amended Section 337(c) to

¹⁹ The court of appeals termed the argument the "'kitchen sink' or 'let's try anything' approach to appellate advocacy." (Pet. 28a.)

²⁰ The court of appeals cited *Buttfield v. Stranahan*, 192 U.S. 470, 492 (1904); *Young Engineers, Inc. v. USITC*, 721 F.2d 1305, 1315 (Fed. Cir. 1983); and *Sealed Air Corp. v. USITC*, 645 F.2d 976, 985-86 (CCPA 1981).

²¹ In no genuine sense does Section 337 establish private rights to relief. A complainant cannot recover damages. Proof of an unfair practice (such as unlicensed use of patent rights) does not entitle a party to relief; the complainant must go further and demonstrate threatened destruction or substantial injury to a domestic industry that is "efficiently and economically operated." Section 337(a). Even then, the Commission has broad discretion to deny any relief after conducting the required remedy proceeding under Section 337(d) to determine the effect of an exclusion order upon "the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers . . ." If the ITC determines that some relief is appropriate, the President may nonetheless disapprove it for "policy reasons" under Section 337(g)(2).

allow such defenses so that the assertion of invalid patent rights would not deny imported products to the domestic market. S. Rep. No. 1298, 93d Cong., 2d Sess. 196 (1974). But in doing so, Congress made clear that the ITC's consideration of such issues was solely "for the purposes of determining whether section 337 is being violated" and that such determinations should "not have a res judicata or collateral estoppel effect" on the patent issues. *Id.* The ITC's patent determinations, in other words, are made in the exercise of the ITC's delegated power to regulate foreign commerce, and do not serve to adjudicate private patent rights. See *Corning Glass Works v. USITC*, 799 F.2d 1559, 1566-67, 1570 n.12 (Fed. Cir. 1986).

Petitioners incorrectly contend that this Court's decision in *Commodity Futures Trading Comm'n v. Schor*, 106 S.Ct. 3245 (1986), rejects the long line of authority which takes account of the "distinction between public rights and private rights" in determining the scope of Article III. 106 S.Ct. at 3259. To the contrary, *Schor* holds that the distinction is not "determinative," but that it embodies the important consideration that there is ordinarily no encroachment on judicial powers when "Congress selects a quasi-judicial method of resolving matters that 'could be conclusively determined by the Executive and Legislative Branches.'" *Id.*, quoting *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 589 (1985). That, of course, was precisely the court of appeals' rationale in this case—that Section 337 is in substance a delegation to the ITC of the Congressional power to regulate foreign commerce, subject to the President's veto.²²

²² It is also noteworthy that the Executive's veto power over ITC exclusion orders is itself "incompatible with the limitations upon judicial power this Court has drawn from Article III." *Glidden Co. v. Zdanok*, 370 U.S. 530, 582 (1962) (plurality opinion by Justice Harlan); see also *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113-14 (1948).

Petitioners' reliance upon *Schor* is ultimately self-defeating. Here, as in *Schor*, petitioners waived any rights they may have had under Article III through their failure to assert them before they received an adverse decision following completion of evidentiary proceedings before the ALJ. 106 S. Ct. at 3257.

III. THERE WAS NO DENIAL OF "NATIONAL TREATMENT" TO PETITIONERS' ARAMID FIBER

Based chiefly on their "due process" and Article III contentions, petitioners argue that the ITC's procedures denied their products "national treatment" under GATT²³ and the Treaty of Friendship, Commerce and Navigation ("Netherlands Treaty"), between the United States and The Netherlands. 8 U.S.T. 2043, T.I.A.S. No. 3942 (entered into force December 5, 1957). (Pet. 26-28.)²⁴

In the court of appeals, petitioners focused on alleged procedural discrimination against themselves as foreign nationals. They relied on Article V(1) of the Netherlands Treaty, which provides for "national treatment with respect to access to the courts of justice and to administrative tribunals and agencies within the territories of the other Party . . ." Citing prior authorities that have rejected this argument, the court of appeals observed that the ITC's procedures in Section 337 cases

²³ "GATT" is the General Agreement on Tariffs and Trade, 4 Bevans 639, 61 Stat. 5, T.I.A.S. 1700 (1947), to which both the United States and The Netherlands are parties.

²⁴ Petitioners also contend that they were disadvantaged by their inability to litigate before the ITC a counterclaim alleging that Du Pont was infringing a separate U.S. patent owned by petitioners and used in a different stage of the manufacture of aramid fiber. The court of appeals rejected this argument because (i) petitioners' infringement counterclaim was in no sense a relevant defense to their misappropriation of Du Pont's process patent; and (ii) petitioners' infringement claim was rejected after trial in *Akzo, N.V. v. E.I. Du Pont de Nemours & Co.*, 635 F. Supp. 1336 (E.D. Va. 1986), *aff'd*, 810 F.2d 1148 (Fed. Cir. 1987). (See Pet. 30a-31a.)

are applied evenhandedly to all persons, regardless of their nationality. (Pet. 22a-23a, citing *Certain Spring Assemblies and Components Thereof*, 216 USPQ 225, 231 (ITC 1981), *aff'd sub nom. General Motors Corp. v. USITC*, 687 F.2d 476 (CCPA 1982), *cert. denied*, 459 U.S. 1105 (1983).)

Although petitioners continue to assert that they were personally denied "national treatment," the only treaty provisions they urge upon this Court are Article XVI of the Netherlands Treaty—never cited to the court of appeals—which accords national treatment to the "[p]roducts of either Party" within each other's territory "in all matters affecting internal taxation, sale, distribution, storage and use;" and Article III(2) of GATT, which likewise pertains to the internal taxation and regulation of "products . . . imported into the territory of any other contracting party." (Pet. 27.) But these treaty provisions respecting "products" apply only to the internal treatment of articles "after the importation process has been completed and the goods are 'within the territory of the other Party.'" *In Re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 319, 323 (3d Cir. 1983).²⁵ The treaty terms respecting "products" do "not restrict the rights of the United States to regulate imports" or to "regulate unfair competition from abroad." 723 F.2d at 323-24. Section 337, of course, regulates imports and unfair competition from abroad.²⁶

²⁵ The *Japanese Electronic Products* decision construed Article XVI of the Treaty of Friendship, Commerce and Navigation between the United States and Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863 (1953), which is identical to Article XVI of the Netherlands Treaty. Petitioners concede that the Japanese Treaty and The Netherlands Treaty are two of many such treaties containing "virtually identical provisions." (Pet. 27 n.31.)

²⁶ Petitioners' discussion of United States—Imports of Certain Automotive Spring Assemblies. GATT BISD, 30th Supp. at 107 (May 26, 1983), ignores that the GATT Conciliation Panel decided in that case that Section 337 is exempt from GATT. (See Pet. 29 n.33.)

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

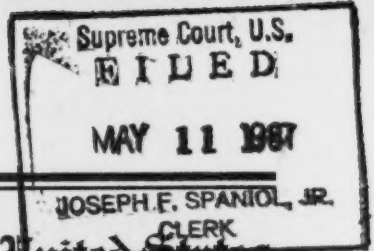
JOSEPH M. FITZPATRICK
FITZPATRICK, CELLA,
HARPER & SCINTO
277 Park Avenue
New York, New York 10172
(212) 758-2400

DANIEL M. GRIBBON *
HARRIS WEINSTEIN
EUGENE D. GULLAND
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

May 1987

* Counsel of Record

(3)
No. 86-1519



In the Supreme Court of the United States

OCTOBER TERM, 1986

AKZO N.V., ENKA B.V., ARAMIDE MAATSCHAPPIJ
V.O.F., and AKZONA INCORPORATED, PETITIONERS

v.

U.S. INTERNATIONAL TRADE COMMISSION and
E.I. DU PONT DE NEMOURS AND COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

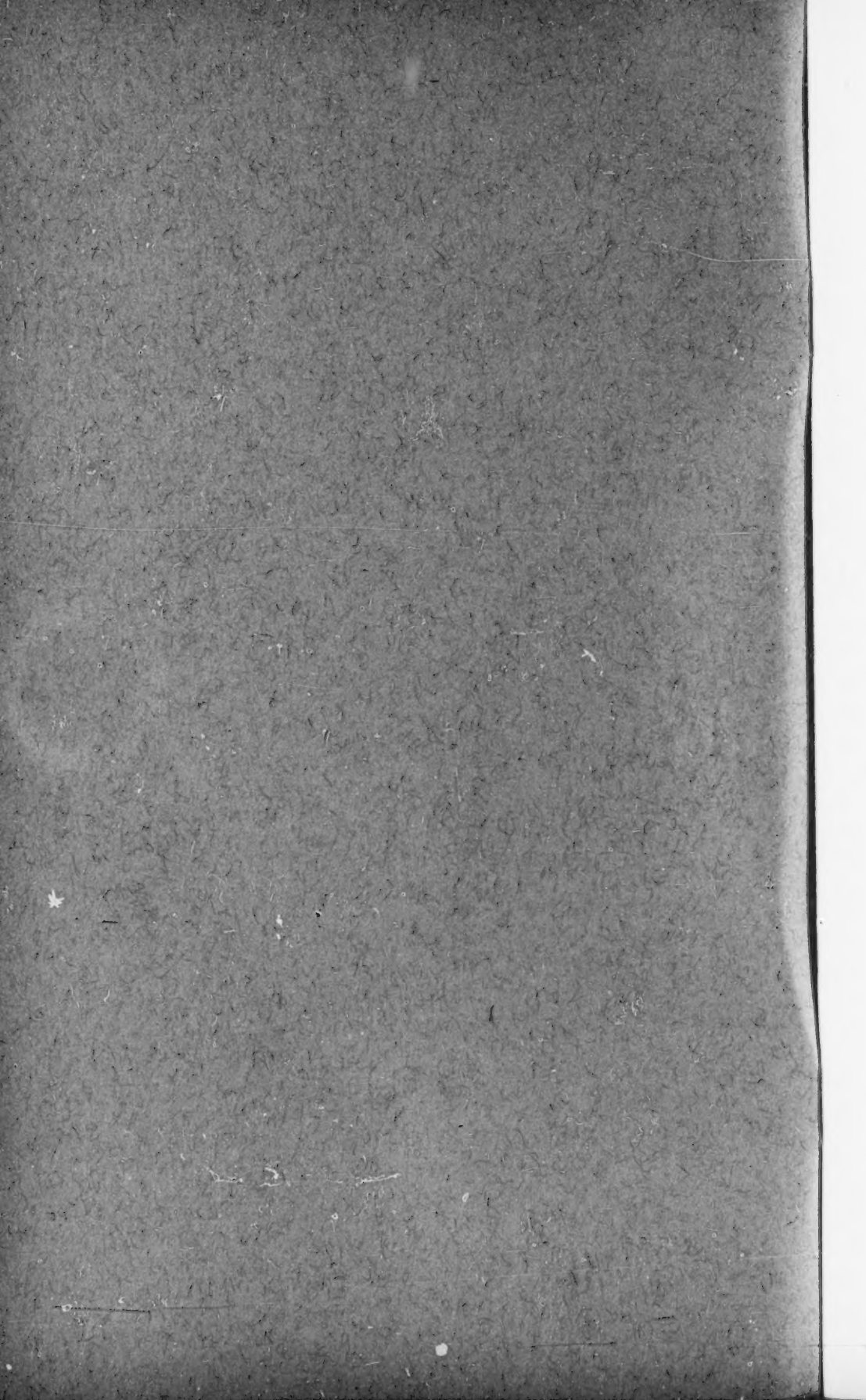
BRIEF FOR THE U.S. INTERNATIONAL TRADE
COMMISSION IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

JUDITH M. CZAKO
Acting Assistant General Counsel
U.S. International Trade Commission
Washington, D.C. 20436

CATHERINE R. FIELD
Assistant General Counsel
Office of the United States
Trade Representative
Washington, D.C. 20506

36pt



QUESTIONS PRESENTED

1. Whether the U.S. International Trade Commission violated petitioners' due process rights by denying their managerial employees and in-house counsel (while giving to their outside counsel and experts) access to their competitor's confidential business information, whose designation as "confidential" petitioners could have challenged but did not challenge.

2. Whether the Constitution permits Congress to delegate to the U.S. International Trade Commission, rather than an Article III court, the power to make a determination of patent validity and enforceability solely for the purpose of determining the existence of unfair methods of competition and unfair acts in import trade, and without res judicata or collateral estoppel effect.

3. Whether 19 U.S.C. 1337, which makes unlawful and authorizes action against unfair methods of competition and unfair acts in the importation of articles or in their sale in the United States, whether practiced by foreign or U.S. nationals, violates the obligation of the United States under international agreements to accord petitioners and their products treatment no less favorable than that accorded U.S. nationals and products.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	12
Conclusion	29

TABLE OF AUTHORITIES

Cases:

<i>Abourezk v. Reagan</i> , 785 F.2d 1043 (D.C. Cir. 1986), cert. granted, No. 86-656 (Dec. 15, 1986)	18-19
<i>Amtorg Trading Corp., In re</i> , 75 F.2d 826 (C.C. P.A.), cert. denied, 296 U.S. 576 (1935)	2-3
<i>Ball Memorial Hospital v. Mutual Hospital Insurance</i> , 784 F.2d 1325 (7th Cir. 1986)	26
<i>Buttfield v. Stranahan</i> , 192 U.S. 470 (1904)	11, 20
<i>CFTC v. Schor</i> , No. 85-621 (July 7, 1986)	20, 21, 24
<i>Certain Rotary Wheel Printers</i> , 5 I.T.R.D. 1933 (1983)	7, 16
<i>Certain Spring Assemblies & Components Thereof</i> , 216 U.S.P.Q. (BNA) 225 (ITC 1981), aff'd sub nom. <i>General Motors Corp. v. ITC</i> , 687 F.2d 476 (C.C.P.A. 1982), cert. denied, 459 U.S. 1105 (1983)	25, 28
<i>Cipollone v. Liggett Group Inc.</i> , 106 F.R.D. 573 (D.N.J. 1985)	16
<i>Corning Glass Works v. ITC</i> , 799 F.2d 1559 (Fed. Cir. 1986)	23
<i>deVyver v. Warden, U.S. Penitentiary</i> , 388 F. Supp. 1213 (M.D. Pa. 1974)	18
<i>Doe v. District of Columbia</i> , 697 F.2d 1115 (D.C. Cir. 1983)	19, 26
<i>Duracell, Inc. v. ITC</i> , 778 F.2d 1578 (Fed. Cir. 1985)	22
<i>Easton Utilities Commission v. Atomic Energy Commission</i> , 424 F.2d 847 (D.C. Cir. 1970)	18

IV

Cases—Continued:

Page

<i>Frischer & Co. v. Bakelite Corp.</i> , 39 F.2d 247 (C.C.P.A.), cert. denied, 282 U.S. 852 (1930)....	3
<i>Glidden Co. v. Zdanok</i> , 370 U.S. 530 (1962)	22
<i>Greene v. McElroy</i> , 360 U.S. 474 (1959)	18
<i>Helminski v. Ayerst Laboratories</i> , 766 F.2d 208 (6th Cir.), cert. denied, 474 U.S. 981 (1985)....	19-20
<i>Maritime Cinema Service Corp. v. Movies en Route, Inc.</i> , 60 F.R.D. 587 (S.D.N.Y. 1973)	26
<i>Morgan v. United States</i> , 304 U.S. 1 (1938)	18, 19
<i>N.V. Akzo v. E.I. Dupont de Nemours</i> , 810 F.2d 1148 (Fed. Cir. 1987), aff'g 635 F. Supp. 1336 (E.D. Va. 1986)	27
<i>Nixon v. Warner Communications, Inc.</i> , 435 U.S. 589 (1978)	19
<i>Northern Pigment Co., In re</i> , 71 F.2d 447 (C.C.P.A. 1934)	3
<i>Northern Pipeline Construction Co. v. Marathon Pipe Line Co.</i> , 458 U.S. 50 (1982)	20, 24
<i>Norwegian Nitrogen Products Co. v. United States</i> , 288 U.S. 294 (1933)	17
<i>Ohio Bell Tel. Co. v. Public Util. Comm'n</i> , 301 U.S. 292 (1937)	18
<i>Orion Co., In re</i> , 71 F.2d 458 (C.C.P.A. 1934)	3, 21
<i>San Juan Star Co., In re</i> , 662 F.2d 108 (1st Cir. 1981)	19
<i>Sealed Air Corp. v. ITC</i> , 645 F.2d 976 (C.C.P.A. 1981)	20-21
<i>Seattle Times Co. v. Rhinehart</i> , 467 U.S. 20 (1984)	15
<i>Tavoulareas v. Washington Post Co.</i> , 724 F.2d 1010, vacated, 737 F.2d 1170 (D.C. Cir. 1984)....	16
<i>Textron, Inc. v. ITC</i> , 753 F.2d 1019 (Fed. Cir. 1985)	21
<i>Triangle Ink & Color Co. v. Sherwin-Williams Co.</i> , 61 F.R.D. 634 (N.D. Ill. 1974)	26
<i>U.S. Steel Corp. v. United States</i> , 730 F.2d 1465 (Fed. Cir. 1984)	14-15
<i>Von Clemm, In re</i> , 229 F.2d 441 (C.C.P.A. 1955)....	3
<i>Wirtz v. Baldor Electric Co.</i> , 337 F.2d 518 (D.C. Cir. 1963)	18, 19

Cases—Continued:

Page

<i>Young Engineers, Inc. v. ITC</i> , 721 F.2d 1305 (Fed. Cir. 1983)	21
<i>Zenith Radio Corp. v. Matsushita Electric Industrial Co.</i> , 529 F. Supp. 866 (E.D. Pa. 1981)	16

Constitution, treaties, statutes, regulation and rule:

U.S. Const.:

Art. I	23
§ 8, Cl. 3	20
Art. III	11, 19, 21, 22, 24
Amend. V (Due Process Clause)	12

General Agreement on Trades and Tariffs, Oct. 30,
1947, 61 Stat. Pt. 5, T.I.A.S. No. 1700, 55
U.N.T.S. 188:

Art. III	27-28
Art. III(4)	24
Art. XX	28
Art. XX(d)	28
Art. XXIII	28

Treaty of Friendship, Commerce and Navigation,
Mar. 27, 1956, United States-Netherlands, 8
U.S.T. 2043, T.I.A.S. No. 3942:

Art. XVI(1)	24-25
Art. XXIII	25

Administrative Procedure Act, 5 U.S.C. (& Supp.
III) 551 *et seq.*

5 U.S.C. 555(b) (§ 6(a))	17, 18
5 U.S.C. 557(b) (§ 8(a))	4
5 U.S.C. 556(e) (§ 7(d))	18

Tariff Act of 1922, ch. 356, § 316, 42 Stat. 943..... 2

Tariff Act of 1930, 19 U.S.C. (& Supp. III) 1202
et seq.:

§ 330(a), 19 U.S.C. 1330(a)	24
§ 333, 19 U.S.C. 1333	14
§ 337, 19 U.S.C. (& Supp. III) 1337	<i>passim</i>
§ 337(a), 19 U.S.C. 1337(a)	2, 3, 8, 21

VI

Statutes, regulation and rule—Continued:	Page
§ 337 (b), 19 U.S.C. 1337 (b)	6
§ 337 (c), 19 U.S.C. (& Supp. III) 1337 (c)	5, 22
§ 337 (d), 19 U.S.C. 1337 (d)	5
§ 337 (f), 19 U.S.C. 1337 (f)	5
§ 337 (g), 19 U.S.C. 1337 (g)	5
§ 337a, 19 U.S.C. 1337a	2, 5
Trade Act of 1974, Pub. L. No. 93-618, § 341 (a), 88 Stat. 2053	5
35 U.S.C. 102	8
35 U.S.C. 103	8
19 C.F.R.:	
Section 210.6	6
Section 210.53 (h)	9
Section 210.54	4
Section 210.55	4
Section 210.56 (c)	4
Fed. R. Evid. 615	13
Miscellaneous:	
1 C. Koch, <i>Administrative Law and Practice</i> (1985)	13
4 J. Moore, J. Lucas & G. Grotheer, <i>Moore's Fed- eral Practice</i> (2d ed. 1984)	26
S. Rep. 93-1298, 93d Cong., 2d Sess. (1974)	5, 12, 14, 21, 22, 23
<i>United States—Imports of Certain Automotive Spring Assemblies</i> , GATT Basic Instruments and Selected Docs., 30th Supp. (May 26, 1983); Conciliation Report, L/5333, of the Panel (adopted May 26, 1983)	27

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**BRIEF FOR THE U.S. INTERNATIONAL TRADE
COMMISSION IN OPPOSITION**

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 808 F.2d 1471. The public versions of the opinions of the U.S. International Trade Commission and the administrative law judge (public and confidential versions of which have been filed with the Clerk by petitioners) are unofficially reported at USITC Pub. No. 1824. The protective order issued by the administrative law judge (Pet. App. 33a-39a) and the relevant orders denying peti-

tioners' requests to modify the protective order (Pet. App. 40a-56a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 1986. The petition for a writ of certiorari was filed on March 20, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 337 of the Tariff Act of 1930, 19 U.S.C. (& Supp. III) 1337, is a trade statute directed against unfair practices in the import trade. The statute was originally enacted as Section 316 of the Tariff Act of 1922, ch. 356, 42 Stat. 943. Throughout various reenactments, revisions, and amendments over the last 65 years, the substantive portion of the statute has remained essentially unchanged. It provides (19 U.S.C. 1337(a)):

Unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States, are declared unlawful, and when found by the [U.S. International Trade] Commission to exist shall be dealt with, in addition to any other provisions of law, as provided in this section.^[1]

¹ A companion statutory provision, 19 U.S.C. 1337a, passed in response to the ruling of the Court of Customs and Patent Appeals that process patents were not properly within the

Section 337(a) does not specifically define unfair acts or methods of competition but leaves identification of such acts or methods to the discretion of the U.S. International Trade Commission (ITC or Commission), subject to court review.² The ITC has defined these terms by analogy to other statutes and the common law. This is one reason why Section 337(a) provides that Section 337 operates "in addition to any other provision of law."

The ITC most commonly institutes Section 337 investigations on receipt of a proper complaint. In such cases, there are three parties: complainant(s), respondent(s), and a Commission investigative attorney, who represents the public interest in the investigation. On institution, the ITC refers the investigation to an administrative law judge (ALJ) for an evidentiary hearing.

Section 337 investigations are subject to the Administrative Procedure Act (APA), 5 U.S.C. (& Supp. III) 551 *et seq.* They are adversarial proceedings, including a period for discovery, a hearing on

ing Corp., 75 F.2d 826, cert. denied, 296 U.S. 576 (1935)), states that

scope of the Commission's jurisdiction (*In re Amtorg Trad-*

[t]he importation for use, sale, or exchange of a product made, produced, processed, or mined under or by means of a process covered by the claims of any unexpired valid United States letters patent, shall have the same status for the purposes of section 1337 of this title as the importation of any product or article covered by the claims of any unexpired valid United States letters patent.

² *In re Von Clemm*, 229 F.2d 441 (C.C.P.A. 1955); *In re Orion Co.*, 71 F.2d 458, 463-464 (C.C.P.A. 1934); *In re Northern Pigment Co.*, 71 F.2d 447, 454-455 (C.C.P.A. 1934); *Frischer & Co. v. Bakelite Corp.*, 39 F.2d 247 (C.C.P.A.), cert. denied, 282 U.S. 852 (1930).

the record, the right to cross-examine witnesses, and the right to compel testimony.³ At the conclusion of these proceedings, the ALJ issues an initial determination (ID). The ID includes findings on the existence of unfair acts or methods of competition in the importation of goods, and whether there is an effect or tendency to destroy or substantially injure an industry, efficiently and economically operated, in the United States. If the unfair act, injury, and economical operation criteria are satisfied, there is a finding of violation of Section 337.

Once the ALJ has issued the ID, any party may petition the Commission for review, or the Commission may review the ID on its own motion (19 C.F.R. 210.54-210.55). On review, the ITC has "all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule" (5 U.S.C. 557(b); see 19 C.F.R. 210.56 (c)).

On a finding of violation of Section 337, the ITC determines what remedy, if any, is appropriate.⁴ In determining whether any remedy should be ordered, the ITC is required to consider certain public interest factors, which may lead it to conclude that no remedy

³ Petitioners misstate the ITC's procedures when they allege (Pet. 6 n.9) that "discovery must ordinarily be completed within four months, and only two weeks are allowed for the hearing even in 'more complicated cases.'" In fact, discovery in Section 337 cases often proceeds up to and even during the course of trial, and the length of trial, which is determined by the needs of the parties and the judgment of the ALJ, may be several weeks.

⁴ The ITC terminates the investigation at this point if no violation is found to exist.

should issue (19 U.S.C. 1337(d)).⁵ Indeed, the legislative history of the 1974 amendments to Section 337 (Trade Act of 1974, Pub. L. No. 93-618, § 341 (a), 88 Stat. 2053) indicates that these public interest considerations are paramount in the administration of the statute (S. Rep. 93-1298, 93d Cong., 2d Sess. 193, 197 (1974)).

Finally, pursuant to Section 337(g), the ITC notifies the President of its determination on violation and action on remedy. The President has 60 days to disapprove the ITC's action for policy reasons. If the President has not disapproved the ITC's action after 60 days, or approves it within 60 days, the ITC's determination becomes final and appealable (19 U.S.C. (Supp. III) 1337(c)).

2. On April 18, 1984, a complaint was filed with the ITC on behalf of respondent E.I. Du Pont de Nemours & Company (Du Pont) alleging a violation of Section 337 and 19 U.S.C. 1337a by reason of the importation of certain aramid fibers⁶ manufactured

⁵ Section 337(d) directs the Commission to order exclusion of imported goods

unless, after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such articles should not be excluded from entry.

Similar provisions apply to issuance of a cease-and-desist order. See 19 U.S.C. 1337(f).

⁶ Aramid fiber is a synthetic fiber five times stronger than steel on an equal-weight basis, having extraordinary heat and stretch resistant qualities. It has a wide range of applications, including bulletproof vests, cables, and aircraft mainframes. Du Pont sells its aramid fiber under the registered trademark Kevlar; petitioners sell their aramid fiber under the registered trademark Twaron.

abroad in accordance with a process that, if practiced in the United States, would infringe claims of U.S. Letters Patent 3,767,756 (the '756 patent).⁷ On May 14, 1984, the ITC voted to institute an investigation pursuant to Section 337(b) and named four related firms as respondents in the investigation. These firms (petitioners here) are Akzo N.V., Enka B.V., and Aramide Maatschappij v.o.f., all of the Netherlands, and Akzona, Inc., of Enka, North Carolina. An ALJ was appointed, and petitioners were directed to respond to the complaint (Notice of Investigation, 49 Fed. Reg. 21806 (1984); C.A. App. 133-135).

On May 21, 1984, the ALJ issued an administrative protective order governing access to and use of confidential business information, as defined in the Commission's rules, 19 C.F.R. 210.6, that would be produced during discovery in the investigation (Pet. App. 33a-39a). Paragraph 10 of the order (*id.* at 37a) stated that, if a recipient of confidential business information under the order disagreed with respect to the designation of the material as confiden-

⁷ Du Pont had already been involved in litigation with petitioners concerning this and other patents pertaining to aramid fiber, beginning when petitioners sued Du Pont in the United States District Court for the Western District of North Carolina in 1983. Before the Commission's institution of the investigation, petitioners made a written submission to the ITC urging it to refuse to institute an investigation because of alleged deficiencies in the complaint and concurrent litigation on related patents in federal district court in Delaware (C.A. App. 122-128). The ITC instituted an investigation with respect to only one count of Du Pont's complaint, declining to investigate alleged unfair methods of competition by misappropriation of benefits of Du Pont's investments in the development of commercial uses and customers for aramid fiber (*id.* at 133-135, 670).

tial, that party was to "confer [with the supplier] as to the status of the subject information proffered within the context of this order." In the event that the two parties continued to disagree regarding the status of the information, the protective order provided that a party could raise the issue with the ALJ or the Commission (*ibid.*).

During a preliminary conference on June 22, 1984, petitioners made an oral motion to modify the existing protective order (see C.A. App. 672 (citing 6/22/84 Tr. 45)). Subsequently, petitioners identified three in-house counsel for the Dutch petitioners, and the general counsel of Akzona, Inc., as potential recipients of confidential business information under the ITC's protective order (C.A. App. 227). Du Pont and the Commission investigative attorney opposed modification of the protective order.

Applying the balancing test set forth in the ITC's opinion in *Certain Rotary Wheel Printers*, 5 I.T.R.D. 1933 (1983), the ALJ denied the motion to permit in-house counsel access to confidential business information under the ITC's protective order (Pet. App. 40a). The ALJ found that petitioners had failed to show the requisite need on the part of these particular attorneys to have access to Du Pont's confidential business information.

On February 8, 1985, petitioners again moved to modify the protective order to permit petitioners' in-house counsel, and the general manager of petitioners' Industrial Fibers Group with supervisory responsibility for the production and marketing of aramid fiber, to have access to confidential information. The ALJ heard extensive oral argument, and testimony of Du Pont's Chief of Marketing for Textile Fibers, on whether there would be substantial competitive harm

to Du Pont if these persons had access to the confidential information in question (C.A. App. 19942-19990). The ALJ repeatedly urged Du Pont to review its designation of confidential information. In his decision, the ALJ found that the record disclosed that the information at issue was confidential business information and that disclosure of the information would cause substantial harm to Du Pont's competitive position. In light of these considerations, the ALJ found that petitioners would be required to demonstrate a clear need for the evidence. The ALJ found that, on the record before him, petitioners had failed to establish that need, and he denied petitioners' motion (Pet. App. 47a, 55a-56a).

On May 9, 1985, the ALJ issued an ID finding that there was a violation of Section 337(a) in the unlawful importation or sale of certain aramid fibers produced overseas by means of a process that, if practiced in the United States, would infringe the '756 patent. He also found that the unlawful importation has the tendency substantially to injure an efficiently and economically operated industry in the United States. C.A. App. 1123.

On July 15, 1985, the Commission decided to review certain portions of the ID, made additional findings on issues related to the validity of the '756 patent, and affirmed the ALJ's determination with respect to validity.⁸ The Commission determined not

⁸ The Commission determined to review those portions of the ID pertaining to anticipation of the '756 patent under 35 U.S.C. 102 and obviousness of the patent under 35 U.S.C. 103. Based on its conclusions regarding the level of ordinary skill in the art, the Commission affirmed the ALJ's findings with respect to anticipation and obviousness and determined that the '756 patent was not invalid. Petitioners have not chal-

to review the remainder of the ID, which thereby became the determination of the Commission (19 C.F.R. 210.53(h)). Based on the record and its findings, the Commission concluded that there was a violation of Section 337 (Notice of Commission Decision to Review ID, 50 Fed. Reg. 30246 (1985); C.A. App. 1127). Having determined that there was a violation of Section 337, the Commission requested and received written submissions on the issues of remedy, public interest, and bonding. On November 25, 1985, the Commission determined that an exclusion order limited to certain forms of aramid fiber produced by petitioners or their affiliates was the appropriate remedy (Commission Action and Order, 50 Fed. Reg. 49776 (1985); C.A. App. 1144-1147). On January 26, 1986, pursuant to Section 337(g), the President decided not to disapprove the Commission's action, which thereupon became final.

3. The court of appeals affirmed the ITC's determination in all respects (Pet. App. 1a-32a). Concerning the patent issues and other substantive issues, the court of appeals held that the ITC's determination was based on correct legal standards and was supported by substantial evidence on the record (*id.* at 6a-16a, 23a-27a, 29a-30a). The court also considered and rejected petitioners' procedural challenges.

a. The court of appeals closely examined the terms and enforcement of the ITC protective order and concluded that petitioners' due process claims were groundless (Pet. App. 17a). The court of appeals concluded that the ITC's protective order provided reasonable access to confidential information, and

lenged in this Court the ITC's determination with respect to the patent issues, or the affirmance of that determination by the court of appeals.

that petitioners had never invoked the dispute resolution procedures of paragraph 10 of the protective order. Furthermore, the court of appeals found that the ITC's policy on disclosure of confidential information to an opposing party's managerial personnel and in-house counsel represents an appropriate balance between competing demands and that application of that policy through a three-part balancing test "[could not] be faulted" in this case (*id.* at 19a).

The court of appeals rejected petitioners' argument that the ITC's protective order denied them due process rights guaranteed by the APA and concluded that the requirements of the APA were satisfied by petitioners' representation by competent outside counsel and expert witnesses who had unrestricted access to all the evidence. The court of appeals noted (Pet. App. 20a-21a) that

"the affirmative grant of the right to appear apparently bestowed by [5 U.S.C.] 555(b) is not blindly absolute, without regard to the status or nature of the proceedings and concern for the orderly conduct of public business." * * * Whatever else § 555(b) guarantees to parties to an administrative proceeding under § 337, it does not mandate disclosure of significant confidential information to in-house counsel and corporate executives of a business competitor—where that information is fully available to outside counsel. Akzo's contention withers in the face of unrebutted evidence that more than 90 people representing Akzo, including numerous expert witnesses and members of the battery of four law firms comprising Akzo's defense team, had unrestricted access to Du Pont's confidential information.

Finally, the court of appeals held that petitioners had failed to demonstrate that they suffered any actual harm or prejudice as a result of the protective order procedure. Moreover, the court of appeals noted that "we have neither found nor been directed to any judicial decision mandating, in the circumstances present here, that business confidential information *must* be made available to inside management," and that there is a substantial body of precedent upholding confidentiality comparable to that accepted by the ITC. Pet. App. 21a.

b. The court of appeals rejected petitioners' argument that Section 337 proceedings are "'inherently judicial'" and involve "'essentially private rights'" and that therefore the Constitution requires adjudication of Section 337 issues by Article III courts (Pet. App. 28a). The court of appeals concluded that, although private rights may be affected by Section 337 determinations, the statute is directed toward protection of the public interest from unfair trade practices in international commerce. Moreover, the court of appeals noted that the Constitution expressly grants plenary power to Congress to regulate commerce with foreign nations, and held that Section 337 is a valid delegation of this broad congressional power for the public purpose of providing an adequate remedy for domestic industries against unfair practices in import trade. *Ibid.* (citing *Buttfield v. Stranahan*, 192 U.S. 470, 492 (1904)).

c. The court of appeals rejected petitioners' argument that the ITC's protective order procedure discriminated against petitioners on the basis of their Dutch nationality and was therefore in violation of U.S. treaty obligations. The court of appeals stressed that petitioners were accorded the same rights as

domestic companies in Section 337 proceedings, and held that petitioners had failed to demonstrate discriminatory treatment, since the protective order treated confidential information of all parties identically. In addition, the court of appeals noted that discrimination arguments had been rejected in a previous Section 337 investigation. Pet. App. 22a-23a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

1. Petitioners contend (Pet. 14-22) that their rights under the Due Process Clause and the APA were violated because only their 90 outside lawyers, experts, and other representatives, not their in-house counsel and management personnel, were given unencumbered access to Du Pont's confidential business information. Petitioners fail to demonstrate that any decision of this Court or another court of appeals supports that claim.

The court of appeals carefully considered petitioners' arguments and concluded that, in the context of a Section 337 investigation, the ITC had accorded petitioners their constitutional and statutory rights to due process.⁹ The terms of the protective order,

⁹ The ITC's determinations under Section 337 are formal adjudicatory proceedings under the APA. See S. Rep. 93-1298, *supra*, at 195 (ITC determinations on violation to be made on the record after notice and opportunity for full hearing in conformity with APA). As petitioners recognize, the APA "codif[ies] traditional due process standards" (Pet. 18 n.22); indeed, a separate "due process" inquiry into the adequacy

providing for in camera hearing of specified "confidential information" and granting access to confidential information to in-house counsel and employees of the parties only on special permission of the Commission or the ALJ, were consistent with ITC policy and practice. Petitioners agreed to the protective order without qualification (C.A. App. 21239-21242). The terms and application of that order conform to APA requirements and represent a rational balancing of the parties' interests.

Paragraph 10 of the order specifically stated that, if a recipient of confidential business information under the order disagreed with respect to the designation of the material as confidential, that party "shall * * * confer [with the supplier] as to the status of the subject information proffered within the context of this order." In the event that the two parties continued to disagree regarding the status of the information, a party could raise the issue with the ALJ or the Commission. Pet. App. 37a. As the court of appeals noted (*id.* at 18a), petitioners did not invoke this procedure. Petitioners, having failed to invoke the very procedure intended to protect their rights, have no basis now to argue that the ITC's protective order deprived them of due process.

Moreover, as the court of appeals properly recognized, the ITC operates under unique constraints in conducting Section 337 investigations and must rely

of procedures followed in formal adjudication is generally unnecessary. 1 C. Koch, *Administrative Law and Practice* § 7.1, at 546 (1985). As petitioners also recognize (Pet. 17), the APA and not Fed. R. Evid. 615 applies to this case. The constitutional and statutory claims joined in the first question presented by the petition, therefore, are essentially a single argument: that the ITC's procedures violated the APA.

on the voluntary production of information by parties in order to carry out its statutory duties.¹⁰ Section 337 investigations inevitably involve the discovery and production of sensitive information relating to the operations, financial condition, and business strategies of all parties (see Pet. App. 33a-34a). By statute, the ITC must make a determination whether there is a violation of Section 337 within 12 months (18 months in more complicated cases) after institution of an investigation. Thus, expeditious, yet thorough, discovery is essential in Section 337 proceedings.¹¹ Completion of adequate discovery within the statutory time limits requires that the parties cooperate with regard to designation of documents as confidential, and with regard to production procedures.¹²

¹⁰ Petitioners argue (Pet. 10 n.16) that the ITC's power to compel production of information under 19 U.S.C. 1333 mitigates this need, but an investigation such as the one at issue here, involving thousands of pages of confidential information, would be impossible to complete within the ITC's strict statutory time limits if the ITC had to resort to compulsory process on a repeated basis to obtain the necessary information.

¹¹ Congress recognized that the statutory time limit could pose administrative problems and noted in the legislative history of the 1974 Act that "[t]he full hearing required would be a full 'due process' hearing, *with the Commission of course being able to impose reasonable restraints on the time to be devoted to such hearings*" (S. Rep. 93-1298, *supra*, at 195 (emphasis added)).

¹² The Federal Circuit has recognized the unusual constraints under which the ITC operates in the context of anti-dumping and countervailing duty investigations. See *U.S.*

A Section 337 proceeding is analogous in certain respects to complex litigation in the courts. It is well recognized that courts have wide discretion in fashioning the terms of protective orders, and "[t]he trial court is in the best position to weigh fairly the competing needs and interests of parties affected by discovery." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984).

The protective order issued in this investigation was fashioned to protect the interests of all parties in full discovery. The order identified material that could be considered confidential and provided a means whereby either party could object to the claimed confidential status of information. The definition of confidential information was limited to that type of information that has consistently been the subject of a protective order, and overdesignation was consistently discouraged (see C.A. App. 18992, 19786). In those instances where petitioners requested disclosure of confidential business information to their managerial employees and in-house counsel, the ALJ heard extensive argument and, contrary to petitioners' assertions (Pet. 21 n.24), properly placed the burden on Du Pont to show that the information in question was confidential and that disclosure would cause substantial injury to Du Pont (C.A. App. 19942-19990). Petitioners' burden of showing need applied not to the status of information as confidential, but to the question whether information that is confidential should nonetheless be disclosed to in-house counsel or mana-

Steel Corp. v. United States, 730 F.2d 1465, 1468 (1984). Even more difficulties exist with regard to discovery and protection of confidential information in Section 337 investigations.

gerial employees of an opposing party who is a business competitor.¹³

Courts have consistently recognized the need for "umbrella orders" in complex litigation such as this investigation.¹⁴ Moreover, provisions similar to paragraph 10 of the ITC's order have been found sufficient to protect parties from overdesignation of confidential business information.¹⁵

Petitioners suggest that the "Sisyphean" burden of showing that it is "absolutely necessary" for a party to have access to confidential information could never be met.¹⁶ Considering that petitioners never at-

¹³ Contrary to petitioners' assertion, ITC procedures do not provide that "at no stage is the party claiming confidentiality required to prove it" (Pet. 21 n.24). If the confidentiality of information is challenged, as provided for in paragraph 10 of the protective order, the burden is placed squarely on the party asserting confidentiality to demonstrate that the information is in fact properly deemed confidential within the terms of the Commission's rules and the protective order.

¹⁴ See, e.g., *Tavoulareas v. Washington Post Co.*, 724 F.2d 1010, 1023-1024 (D.C. Cir. 1984) (citing *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 529 F. Supp. 866, 879 n.18 (E.D. Pa. 1981)), vacated on other grounds, 737 F.2d 1170 (D.C. Cir. 1984) (en banc); *Cipollone v. Liggett Group Inc.*, 106 F.R.D. 573, 583 (D.N.J. 1985).

¹⁵ E.g., *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 529 F. Supp. at 890-891; *Cipollone v. Liggett Group Inc.*, 106 F.R.D. at 584-585.

¹⁶ Despite petitioners' insistence on citing the phrase, "absolutely necessary" is not the standard for disclosure applied by the ITC. If access to confidential information is sought for in-house counsel or other employees of a party, the party seeking access must establish that it has "no other reasonable way of adequately preparing and presenting its arguments in the absence of such access." *Certain Rotary Wheel Printers*, 5 I.T.R.D. at 1937 (citation omitted). This is the

tempted to demonstrate *any* particular need for disclosure, and relied merely on the unsupported assertions of counsel, this argument is without foundation. Moreover, outside legal counsel, having access to the confidential information at issue, is in an excellent position to demonstrate to the ALJ the need of a client for access to particular confidential information and counsel's inability to represent the client's interests adequately without disclosure of such confidential information.

Petitioners argue that the APA guarantees to a corporate party the absolute right to appear in person, through its in-house counsel and employees, at an administrative proceeding, and have access to all information, including confidential business information.¹⁷ But no court has ever held that the right "to appear in person or by or with counsel" (5 U.S.C. 555(b)) precludes an agency from denying a party's in-house personnel access to confidential business information of a competitor that finds its way into the record. Cf. *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294 (1933) (upholding, un-

standard applied by the ALJ in this case. Moreover, as both the ALJ and the court of appeals noted, petitioners were in fact able to and did prepare and present their arguments, challenging and presenting evidence on every issue except infringement (see Pet. App. 20a, 21a).

¹⁷ Notably, petitioners' argument, based as it is on the notion of an absolute right of access, has no limiting principle. According to petitioners, the Constitution and the APA require that a corporation's in-house counsel and management be given access to *all* information produced to a tribunal in administrative or judicial proceedings, no matter how little need those persons have for the information and no matter how great the harm caused by disclosure. Petitioners can point to no decision that departs so far from common sense.

der former statutory provisions, limitations on hearing before ITC's predecessor agency designed to prevent company from learning competitor's confidential business information). Petitioners certainly "appear[ed]" at the hearing in this case, "in person" for much of the hearing and "by or with counsel" at all times. As the court of appeals noted, "[petitioners] fail[] to recognize that 'the affirmative grant of the right to appear apparently bestowed by Section 555(b) is not blindly absolute, without regard to the status or nature of the proceedings and concern for the orderly conduct of public business.'" Pet. App. 20a (quoting *deVyver v. Warden, U.S. Penitentiary*, 388 F. Supp. 1213, 1222 (M.D. Pa. 1974) (citing *Easton Utilities Commission v. Atomic Energy Commission*, 424 F.2d 847, 852 (D.C. Cir. 1970))). Likewise, no court has ever held that making the complete record available to counsel fails to satisfy the general rule that the record "shall be made available to the parties" (5 U.S.C. 556(e)).

Petitioners were represented by competent and experienced counsel and experts in relevant fields. Petitioners' representatives had complete access to the record and responded fully to Du Pont's arguments and the evidence of record. Indeed, petitioners challenged Du Pont on every point (except infringement), presenting their own economic and market forecasts and five affirmative defenses. Thus, this case differs significantly from those cases on which petitioners rely (Pet. 18-19), which address the issue of total denial of access to the party or counsel.¹⁸ The record

¹⁸ *Ohio Bell Tel. Co. v. Public Util. Comm'n*, 301 U.S. 292 (1937); *Greene v. McElroy*, 360 U.S. 474 (1959); *Morgan v. United States*, 304 U.S. 1 (1938); *Wirtz v. Baldor Electric Co.*, 337 F.2d 518 (D.C. Cir. 1963); see also *Abourezk v.*

in this case shows that petitioners were not denied "a reasonable opportunity to know the claims of the opposing party and to meet them" (*Morgan v. United States*, 304 U.S. at 18). Moreover, as the court of appeals concluded, petitioners suffered no "actual harm" in the presentation of their case.¹⁹

Reagan, 785 F.2d 1043, 1060-1061 (D.C. Cir. 1986), cert. granted, No. 86-656 (Dec. 15, 1986), cited at Pet. 19. Petitioners also rely (Pet. 19-20) on certain cases that do endorse a right of the party to be present in person—as opposed to through counsel—at certain stages of certain proceedings or to obtain personal access to discovered information. None of the decisions that petitioners cite, however, endorses any right to learn a competitor's confidential business information. See *Helminski v. Ayerst Laboratories*, 766 F.2d 208, 218 (6th Cir.), cert. denied, 474 U.S. 981 (1985); *Doe v. District of Columbia*, 697 F.2d 1115, 1119-1120 (D.C. Cir. 1983); *In re San Juan Star Co.*, 662 F.2d 108, 118 (1st Cir. 1981). Indeed, the court in *Doe* pointed specifically to orders that forbid counsel to disclose confidential business information to their clients as examples of permissible protective orders (697 F.2d at 1120 n.8). Finally, petitioners rely on various right-of-public-access cases as if those cases endorsed an absolute right to attend proceedings and to inspect and copy judicial records (Pet. 14 n.19, 21-22). They claim, apparently, that the public has a right to learn Du Pont's confidential business information if used in administrative proceedings and that petitioners' right to learn that information follows *a fortiori*. The public, however, obviously does not have any such right. "[T]he right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes. For example, * * * courts have refused to permit their files to serve as * * * sources of business information that might harm a litigant's competitive standing." *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978).

¹⁹ A showing of actual harm or prejudice is required to warrant a reversal on due process grounds. *Helminski v.*

2. Petitioners claim (Pet. 22-26) that, for at least the last 13 years, the Commission has been operating under a statute that unconstitutionally gives it powers that can only be exercised by an Article III court. That argument, quite properly characterized by the court of appeals as one "employing the 'kitchen sink' or 'let's try anything' approach to appellate advocacy" (Pet. App. 28a), does not merit this Court's review.

The determination whether to exclude imported goods or prohibit their sale in the United States, in order to protect U.S. industries from unfair trade practices in international commerce, is made pursuant to Congress's expressly enumerated power "[t]o regulate Commerce with foreign Nations" (U.S. Const. Art. I, § 8, Cl. 3). "The power to regulate commerce with foreign nations is expressly conferred upon Congress, and being an enumerated power is complete in itself, acknowledging no limitations other than those prescribed in the Constitution." *Buttfield v. Stranahan*, 192 U.S. 470, 492 (1904).²⁰ Moreover, the ITC cannot award money damages and does not exercise anything remotely resembling "all ordinary powers of district courts" (*Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 85 (1982) (opinion of Brennan, J.); see *CFTC v. Schor*, No. 85-621 (July 7, 1986), slip op. 19).

Section 337 and its predecessor provisions are nothing more or less than a delegation of Congress's Article I power (*Sealed Air Corp. v. ITC*, 645 F.2d 976,

Ayerst Laboratories, 766 F.2d at 218; *Wirtz v. Baldor Electric Co.*, 337 F.2d 518 (D.C. Cir. 1963).

²⁰ As this Court held in *Buttfield*, the ability, even of citizens, to engage in importation is not a vested right, but one granted as an act of grace.

985-986 (C.C.P.A. 1981)) for the purpose of providing an adequate remedy for domestic industries against unfair practices undertaken abroad (*id.* at 985; *In re Orion Co.*, 71 F.2d at 467).²¹ The Commission (subject to presidential review), not the courts, has exercised this delegated power for 65 years, and throughout that time it has "entertained complaints of importation or sale of articles allegedly made in accordance with the specifications and claims of a U.S. patent" (S. Rep. 93-1298, *supra*, at 196).²²

²¹ Moreover, the court of appeals properly recognized that "a § 337 proceeding 'is not purely private litigation "between the parties" but rather is an "investigation" by the Government into unfair methods of competition or unfair acts in the importation of articles into the United States'" (Pet. App. 28a (quoting *Young Engineers, Inc. v. ITC*, 721 F.2d 1305, 1315 (Fed. Cir. 1983))). The statute's requirement of substantial injury to a U.S. industry, and the remedies that it provides, demonstrate the focus of the statute on public rather than purely private rights. Contrary to petitioners' argument (Pet. 25-26), the court of appeals did not err by relying on a distinction between public and private rights. The Court has held that such a distinction is not necessarily *determinative* of Article III issues, but it has hardly regarded the distinction as unimportant. See *Schor*, slip op. 19.

²² Section 337 does not, however, function merely as the international extension of U.S. patent, trademark, and copyright laws. *Textron, Inc. v. ITC*, 753 F.2d 1019, 1028 (Fed. Cir. 1985). Indeed, Section 337 provides that the ITC must find more than an unfair act or method of competition. The statute provides that the accused imports must have "the effect or tendency * * * to destroy or substantially injure an industry, efficiently and economically operated, in the United States or to prevent the establishment of such an industry" (19 U.S.C. 1337(a)). Even if the ITC finds a violation of Section 337(a), public interest considerations may preclude

Before 1974, when importers were charged with patent infringement as a form of unfair trade, they could not raise the defense of patent invalidity unless a court of competent jurisdiction had already declared the patent invalid (S. Rep. 93-1298, *supra*, at 196). In the 1974 amendments, Congress considerably expanded the rights of parties such as petitioners in Section 337 proceedings by giving the ITC the power to consider the validity and enforceability of patents in deciding whether there is a violation of Section 337. In 1974, Congress substantially amended Section 337(c) to provide that the ITC should accept and consider evidence regarding all legal and equitable defenses.²³

The legislative history of the Trade Act of 1974 reflects Congress's careful limitation of the effect of

the selected remedy or the President may disapprove, for policy reasons, the ITC's action in ordering a remedy.

It is doubtful whether Congress could give jurisdiction over Section 337 investigations to an Article III court so long as the President retains unrestricted discretion to disapprove Section 337 determinations for policy reasons. Article III does not countenance "an extrajudicial revisory authority" over the decisions of the judiciary. *Glidden Co. v. Zdanok*, 370 U.S. 530, 582 (1962) (plurality opinion). Section 337 as amended avoids this potential Article III pitfall by providing for review by the United States Court of Appeals for the Federal Circuit after the presidential review period. The decision of the President to disapprove a Section 337 determination for policy reasons is not reviewable, either directly or indirectly, in the Federal Circuit. *Duracell, Inc. v. ITC*, 778 F.2d 1578, 1581 (Fed. Cir. 1985).

²³ The Senate report observed that "[t]he Commission would * * * consider the evolution of patent law doctrines, including defenses based upon antitrust and equitable principles, and the public policy of promoting 'free competition', in the determination of violations of the statute." S. Rep. 93-1298, *supra*, at 196.

ITC determinations. The Senate Finance Committee stated (S. Rep. 93-1298, *supra*, at 196 (emphasis added)):

The Commission is not, of course, empowered under existing law to set aside a patent as being invalid or to render it unenforceable, and the extent of the Commission's authority under this bill is to take into consideration such defenses and to make findings thereon *for the purposes of determining whether section 337 is being violated*.

The relief provided for violations of section 337 is "in addition to" that granted in "any other provisions of law". The criteria of section 337 differ in a number of respects from other statutory provisions for relief against unfair trade practices. For example, in patent-based cases, the Commission considers, *for its own purposes under section 337*, the status of imports with respect to the claims of U.S. patents. *The Commission's findings neither purport to be, nor can they be, regarded as binding interpretations of the U.S. patent laws in particular factual contexts*. Therefore, it seems clear that any disposition of a Commission action by a Federal Court should not have a res judicata or collateral estoppel effect in cases before such courts.

Commission decisions on patent issues are thus made *solely* for the purpose of Section 337 and have no res judicata effect. See also Pet. 28 n.32; cf. *Corning Glass Works v. ITC*, 799 F.2d 1559, 1565 & n.5 (Fed. Cir. 1986) (Federal Circuit does not defer to ITC legal determinations on issues of patent law).

In short, the Commission exercises delegated Article I powers and has, since 1974, allowed importers and foreign manufacturers to raise legal and equitable defenses to charges of unfair trade practices. The

Commission considers those issues and makes non-binding determinations of such issues as patent validity and enforceability solely for the purposes of Section 337. It is inconceivable that, in so doing, the Commission exercises powers reserved to the judiciary under Article III.²⁴

3. Petitioners argue (Pet. 26-29) that they received treatment at the ITC that differs from that accorded a domestic firm defending a patent infringement case in a federal district court, and that the ITC's determination is thus in violation of the obligations of the United States under Article III(4) of the General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. 5, T.I.A.S. No. 1700, 55 U.N.T.S. 188 (GATT), and Article XVI(1) of the Treaty of

²⁴ We cannot let pass without response petitioners' groundless charge that the ITC is an "unabashedly political agency that views its mission as protecting U.S. firms from foreign competition" (Pet. 25), although we do not think, in light of the foregoing analysis, that it has any relevance to the Article III issue that petitioners raise. The ITC is an independent, bipartisan agency organized and empowered to carry out the duties assigned to it by Congress. The organization of the ITC is described in 19 U.S.C. 1330(a). Commissioners are appointed to nine-year terms by the President, with the advice and consent of the Senate. No commissioner who has served more than five years may be reappointed. Not more than three of the six commissioners may be members of the same political party. The ITC's "mission" is "protecting U.S. firms" only in the sense that Section 337 is intended to protect industries in the United States from unfair acts in the import trade. Finally, the ITC has developed a substantial body of expertise in Section 337 matters, of which patent issues are only one element in some instances. The ITC deals with "a particularized area of law" (*Schor*, slip op. 18 (quoting *Northern Pipeline*, 458 U.S. at 85 (opinion of Brennan, J.))) and has expertise that is not open to reasonable question.

Friendship, Commerce and Navigation, Mar. 27, 1956, United States-Netherlands, 8 U.S.T. 2043, T.I.A.S. No. 3942 (Netherlands Treaty). Petitioners do not claim that the decision below on this issue conflicts with any decision of this Court or a court of appeals. In any event, petitioners' claim is wrong.

What constitutes "national treatment" depends on the context. See, *e.g.*, Netherlands Treaty Art. XXIII (defining "national treatment" as treatment no less favorable than that accorded to domestic nationals, companies, products, etc. "in like situations"). The question with respect to national treatment of persons, as the court of appeals recognized, is whether petitioners were accorded the same rights as domestic firms in a Section 337 investigation, and the court correctly ruled that petitioners were indeed accorded the same rights. Pet. App. 22a.

Section-337 does not discriminate between domestic and foreign companies. A foreign company operating in the United States is entitled to file a complaint under Section 337, and a domestic company that seeks to import goods from abroad may find them excluded if their importation would violate Section 337. *Certain Spring Assemblies & Components Thereof*, 216 U.S.P.Q. (BNA) 225 (ITC 1981), *aff'd* on other grounds *sub nom. General Motors Corp. v. ITC*, 687 F.2d 476 (C.C.P.A. 1982), *cert. denied*, 459 U.S. 1105 (1983). Moreover, the protective order procedure applies equally to both foreign and domestic parties in Section 337 investigations.

Petitioners claim that parties defending a patent infringement suit in a federal court receive more favorable treatment in respect of access to confidential information than importers and foreign manufacturers defending a Section 337 case (and that

therefore there is a discrimination between foreign and domestic products in violation of the Netherlands Treaty and the GATT). That claim, however, is based on an attempt to compare quite different proceedings. Section 337 requires resolution of "efficient and economic operation" and "injury" questions not involved in an ordinary infringement suit, and it is those questions that routinely involve confidential information about business conditions and strategies. It is pure speculation for petitioners to assert that, if such issues were to arise and confidential information were to be presented in a case in federal district court, the court would give them access to it. Indeed, federal district courts frequently allow counsel, but *not* their clients, access to competitors' confidential business information. See, e.g., *Ball Memorial Hospital v. Mutual Hospital Insurance*, 784 F.2d 1325, 1345-1346 (7th Cir. 1986); *Doe v. District of Columbia*, 697 F.2d at 1120 & n.8; *Triangle Ink & Color Co. v. Sherwin-Williams Co.*, 61 F.R.D. 634 (N.D. Ill. 1974); *Maritime Cinema Service Corp. v. Movies en Route, Inc.*, 60 F.R.D. 587, 590 (S.D.N.Y. 1973). See generally 4 J. Moore, J. Lucas & G. Grotheer, *Moore's Federal Practice* ¶ 26.75, at 26-488 to 26-490 n.2 (2d ed. 1984).

Petitioners also claim lack of national treatment (Pet. 26) because they were not able, in the Section 337 proceeding before the ITC, to make a counterclaim against Du Pont based on their own U.S. patent, whereas such a counterclaim could be made in a purely domestic patent case. Petitioners, however, did not receive treatment "less favorable" than that accorded U.S. firms and products. To the extent that petitioners' allegations below were considered as a defense to patent infringement, the ITC's treatment of the issue did not differ from that ordinarily ac-

corded in federal court.²⁵ The issue is in any event moot, since petitioners' U.S. patent has been adjudged by the Federal Circuit to be invalid and not infringed (*N.V. Akzo v. E.I. Dupont de Nemours, supra*).

Respondents in a Section 337 proceeding receive the *benefit* of many features of Section 337 that have no parallels in federal court patent proceedings. In addition to patent infringement, a Section 337 complainant must prove that the challenged imports will tend to destroy or substantially injure a domestic industry, efficiently and economically operated. Even if it does so, the Section 337 complainant cannot obtain a judgment for the substantial money damages that would be available in a domestic action for patent infringement. In sum, the claim that imported products are less favorably treated in a Section 337 case than products that are the subject of a patent infringement case is not well founded.

Finally, the GATT contracting parties have found that Section 337 is necessary for the enforcement of U.S. patent laws and that U.S. application of Section 337 therefore does not violate GATT obligations. *United States—Imports of Certain Automotive Spring Assemblies*, GATT Basic Instruments and Selected Docs., 30th Supp. at 107 (May 26, 1983); Conciliation Report, L/5333, of the Panel (adopted May 26, 1983). In that decision, concerning the ITC

²⁵ Petitioners were unable to raise their own U.S. patent as the equivalent of a counterclaim in district court because Section 337 can only be invoked on behalf of an industry in the United States against allegedly unfairly traded *imported* goods, but petitioners were as free as any domestic litigant to file a complaint in district court based on their U.S. patent. In fact, they did so. See *N.V. Akzo v. E.I. Dupont de Nemours*, 810 F.2d 1148 (Fed. Cir. 1987), *aff'g* 635 F. Supp. 1336 (E.D. Va. 1986).

exclusion order issued in *Certain Spring Assemblies & Components Thereof*, *supra*, a GATT dispute settlement panel determined that Section 337 was "necessary" within the terms of GATT Article XX(d). Article XX(d) provides a general exemption from other GATT obligations, including the "national treatment" requirements of GATT Article III.²⁶ The dispute settlement panel did not address the issue of national treatment under Article III of the GATT because of this exemption. Although the contracting parties to the GATT indicated that they could reexamine the "necessity" of Section 337 in different factual circumstances, there is no legitimate basis for distinguishing the present case from the *Certain Spring Assemblies* decision.²⁷

²⁶ Article XX of the GATT provides:

General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

* * * *

(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to * * * the protection of patents, trade marks and copyrights, and the prevention of deceptive practices.

²⁷ We note that on April 23, 1987, the European Economic Community requested consultations and establishment of a dispute settlement panel under Article XXIII of the GATT regarding Section 337. The United States intends to defend Section 337 as consistent with its obligations under the GATT.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

JUDITH M. CZAKO
Acting Assistant General Counsel
U.S. International Trade Commission

CATHERINE R. FIELD
Assistant General Counsel
Office of the United States
Trade Representative

MAY 1987

No. 86-1519

Supreme Court, U.S.

E I L E D

MAY 13 1967

JOSEPH P. SPANIOLO, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

AKZO N.V., ENKA B.V., ARAMIDE MAATSCHAPPIJ v.o.f.,
and AKZONA INCORPORATED,
Petitioners,
v.

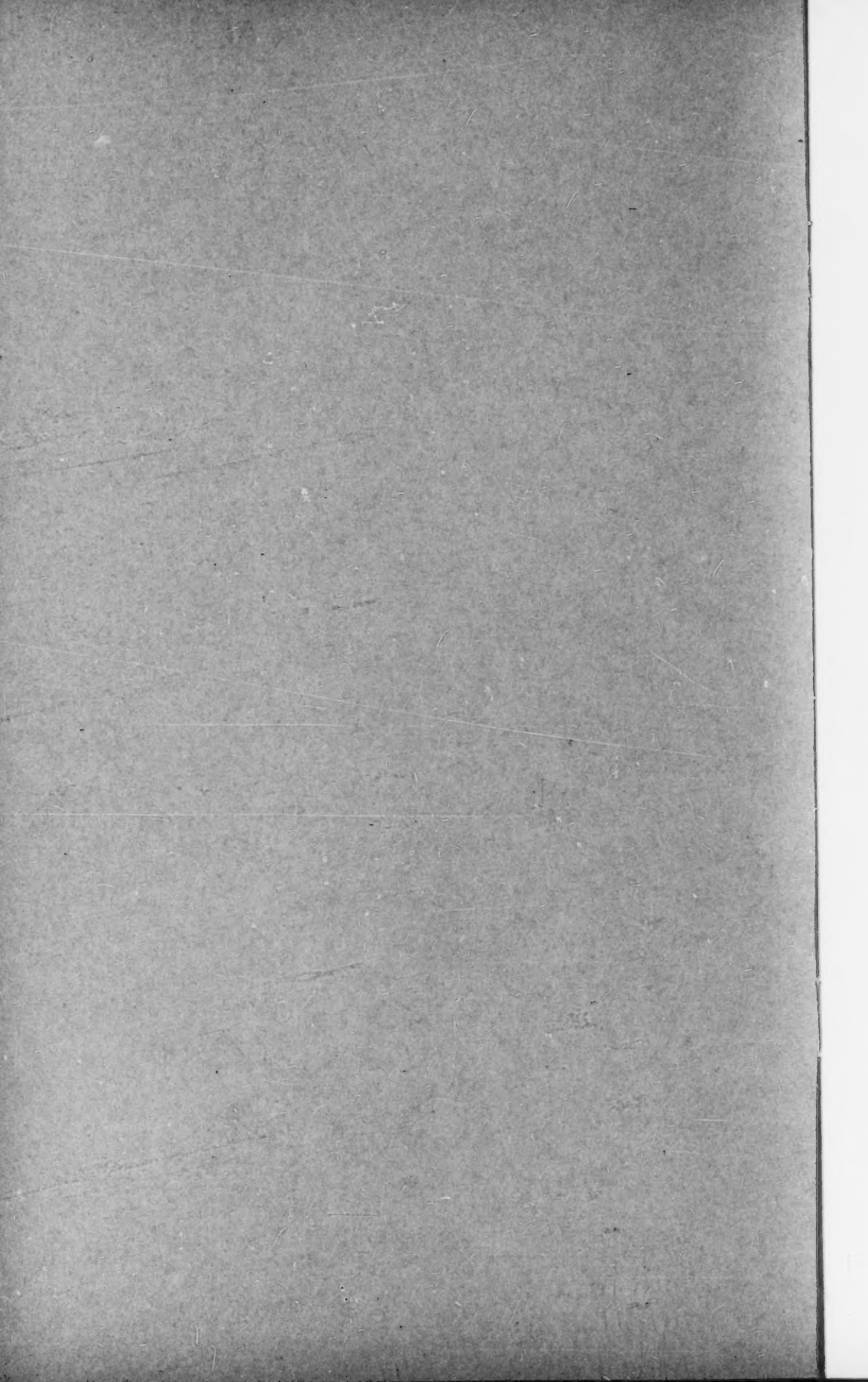
U.S. INTERNATIONAL TRADE COMMISSION and
E.I. DU PONT DE NEMOURS & COMPANY,
Respondents.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Federal Circuit

**RESPONSE OF RESPONDENT
E.I. DU PONT DE NEMOURS & COMPANY TO THE
MOTION OF THE KINGDOM OF THE NETHERLANDS
FOR LEAVE TO FILE A BRIEF AMICUS CURIAE**

DANIEL M. GRIBBON
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-5310

*Attorney for Respondent
E.I. Du Pont de Nemours
& Company*



IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1519

AKZO N.V., ENKA B.V., ARAMIDE MAATSCHAPPIJ v.o.f.,
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**On Petition for Writ of Certiorari to the United States
Court of Appeals for the Federal Circuit**

RESPONSE OF RESPONDENT

**E.I. DU PONT DE NEMOURS & COMPANY TO THE
MOTION OF THE KINGDOM OF THE NETHERLANDS
FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE***

The motion of the Kingdom of the Netherlands recites that respondent E.I. Du Pont de Nemours & Company ("Du Pont") refused to consent to the filing of a brief *amicus curiae*. A copy of Du Pont's letter setting forth the reasons for such refusal, which was not filed with the Clerk, is included as an appendix hereto for consideration by the Court in passing upon the Kingdom's motion.

As is more fully explained in that letter, Du Pont's position is that an *amicus curiae* filing by the Kingdom is inappropriate because the Kingdom's ownership of a

one-half interest in the principal petitioner renders it, at the very least, a friend of petitioners rather than of the Court. Such filing is also inexcusably untimely in view of the Kingdom's active and continued participation on petitioners' behalf in the proceedings below since August, 1985.

CONCLUSION

The motion for leave to file a brief *amicus curiae* should be denied.

Respectfully submitted,

DANIEL M. GRIBBON
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-5310

Attorney for Respondent
E.I. Du Pont de Nemours
& Company

APPENDIX

COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
P. O. Box 7566
Washington, D.C. 20044
(202) 662-6000

May 6, 1987

BY HAND

Mr. Robert Van Nouhoys
Economic Minister
Netherlands Embassy
4200 Linnean Avenue, N.W.
Washington, D.C. 20008

Akzo, N.V. *et al.*, v. U.S. International Trade
Commission and E.I. Du Pont de Nemours and
Company, U.S. Supreme Court No. 86-1519

Dear Mr. Van Nouhoys:

This will confirm my advice to you by telephone this morning that E.I. Du Pont de Nemours and Company ("Du Pont") declines to consent to the filing of a brief *amicus curiae* by the Netherlands Government in support of the petition for certiorari in the above-captioned action.

The petition for certiorari was filed on March 20, 1987. Accordingly, the Netherlands Government had ample opportunity to seek Du Pont's consent to the filing of a brief at a time that would have enabled Du Pont to address such arguments as may be advanced in that brief.

The untimeliness of this request cannot be justified on the ground that the Netherlands Government needed time to study the petition for certiorari and determine its posi-

tion. To the contrary, the Netherlands Government, through a wholly owned development agency, is a 50 percent partner in Aramide Maatschappij v.o.f., the Petitioner that manufactures the aramid fiber that is subject to the limited exclusion order issued by the U.S. International Trade Commission ("ITC"). Such a direct pecuniary interest in the outcome of a controversy is generally regarded as inconsistent with the disinterested perspective expected of an *amicus curiae*.

Furthermore, the Netherlands Government has actively participated in asserting its interests in this dispute. It urged in a written submission to the ITC dated August 1, 1985, that any exclusion order issued by the ITC not embrace "derived products" containing aramid fiber manufactured by the partnership. The Netherlands Government also made representations in an effort to persuade the President to disapprove the limited exclusion order issued by the ITC.

In light of the Netherlands Government's direct commercial interest in the outcome of this proceeding, and its thorough familiarity with the case at all stages, the request for a consent to file a brief *amicus curiae* is, in Du Pont's view, inappropriate and unreasonably belated.

Very truly yours,

/s/ Daniel M. Gribbon
DANIEL M. GRIBBON
Counsel for E.I. Du Pont
de Nemours and Company

No. 86-1519

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

AKZO N.V., ENKA B.V., ARAMIDE MAATSCHAPPIJ v.o.f.,
and AKZONA INCORPORATED,

Petitioners,

—v.—

U.S. INTERNATIONAL TRADE COMMISSION and
E.I. Du PONT de NEMOURS and COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITIONERS' REPLY BRIEF

Of Counsel:

C. FREDERICK LEYDIG
LEYDIG, VOIT & MAYER
One IBM Plaza, Suite 4600
Chicago, Illinois 60611

May 18, 1987

DENIS MCINERNEY*
DAVID R. HYDE
LAURENCE T. SORKIN
CAHILL GORDON & REINDEL
80 Pine Street
New York, New York 10005
(212) 701-3000

**Counsel of Record
for Petitioners*

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
I. DUE PROCESS	1
II. ARTICLE III POWERS.....	8
III. TREATY RIGHTS	9
CONCLUSION	10

TABLE OF AUTHORITIES

Cases	PAGE
<i>Chapman v. California</i> , 386 U.S. 18 (1967)	4n
<i>Doe v. District of Columbia</i> , 697 F.2d 1115 (D.C. Cir. 1983)	6
<i>Greene v. McElroy</i> , 360 U.S. 474 (1959)	7
<i>Grimm v. Brown</i> , 291 F. Supp. 1011 (N.D. Cal. 1968), aff'd, 449 F.2d 654 (9th Cir. 1971)	4n
<i>Gulf & Western Industries, Inc. v. Great Atlantic & Pacific Tea Co.</i> , 476 F.2d 687 (2d Cir. 1973)	7n
<i>Helminski v. Ayerst Laboratories</i> , 766 F.2d 208 (6th Cir.), cert. denied, 106 S. Ct. 386 (1985)	2, 5, 6
<i>Joy v. North</i> , 692 F.2d 880 (2d Cir. 1982), cert. denied, 460 U.S. 1051 (1983)	7
<i>Norwegian Nitrogen Products Co. v. United States</i> , 288 U.S. 294 (1933)	2n
<i>Powhatan Mining Co. v. Ickes</i> , 118 F.2d 105 (6th Cir. 1941)	3-4n
<i>Union Manufacturing Co. v. Han Baek Trading Co.</i> , 763 F.2d 42 (2d Cir. 1985)	8
<i>Wirtz v. Baldor Electric Co.</i> , 337 F.2d 518 (D.C. Cir. 1963)	6n
<i>Young Engineers, Inc. v. United States International Trade Commission</i> , 721 F.2d 1305 (Fed. Cir. 1983) ...	8
Statutes	
Administrative Procedure Act	
5 U.S.C. § 555(b) (1982)	2
5 U.S.C. § 556(e) (1982)	2

Tariff Act § 337, 19 U.S.C. § 1337 (1982 & Supp. III 1985).....	<i>passim</i>
---	---------------

Other Authorities

<i>EC Will Test Validity of Tariff Act § 337 Under GATT</i> , 52 Antitrust & Trade Reg. Rep. (BNA) 656 (April 2, 1987).....	9
<i>General Agreement on Tariffs and Trade</i> , Oct. 30, 1947, 4 Bevans 639, 61 Stat. 5, T.I.A.S. No. 1700.....	9
<i>United States—Imports of Certain Automotive Spring Assemblies</i> , GATT BISD, 30th Supp. at 107 (May 26, 1983).....	9n



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Respondents.

PETITIONERS' REPLY BRIEF

I. DUE PROCESS

The petition ("Pet.") presents important and recurring due process issues based on facts not disputed by respondents, including:

(a) Petitioners were denied access to all or part of 80% of the thousands of pages of exhibits received in evidence against them (DuPont Br. 4 n.4; Pet. 7 n.11), and were also excluded from the hearing room during 80% of the thousands of pages of DuPont oral testimony against them (*ibid.*).

(b) Although some of these exhibits and portions of the "confidential" transcript were later declassified by DuPont after the witnesses left the stand or the hearing had been concluded (Pet. 8 & n.12; DuPont Br. 4 n.4), a vast amount of the evidence remains secret. The petitioners have still not been permitted to see the "confidential"

complaint (Pet. 5) or to know the basis for critical elements of the ITC's decision against them, or even to read key parts of that decision (Pet. 8).

(c) These procedures are routinely followed by the ITC in Section 337 hearings (Pet. 11; ITC Br. 26; DuPont Br. 3). No one has been able to persuade the ITC to grant a party access to evidence designated "confidential" by the other side (Pet. 12).

The opposing briefs also agree that the Administrative Procedure Act ("APA") guarantees petitioners the right "to appear in person or by or with counsel" and provides that the "transcript of the testimony and exhibits . . . shall be made available" to them (5 U.S.C. §§ 555(b), 556(e)), and they concede that these rights should have been granted petitioners in the proceedings below (ITC Br. 17-18; DuPont Br. 13). However, respondents assert that these due process guarantees are satisfied if *either* counsel *or* the party are allowed to appear and to have access to the evidence (ITC Br. 12-13, 18; DuPont Br. 8, 11-12). Respondents assume, *sub silentio*, that the choice is the adversary's.

Thus this case squarely presents the issue of whether, consistent with due process and the requirements of the APA, a party accused in an agency proceeding may be subjected to a trial by proxy, denied access both to the documentary evidence against him and to the hearing room, and thus rendered unable to assist counsel in his own defense. Petitioners maintain that they had these fundamental rights *regardless* of whether or not the evidence against them included confidential business data.¹ Respondents have failed to cite a single case to the contrary; their closest "authority" is the *Helminski* autistic child case (see pp. 5-6 below).

¹ In the only ITC case ever to have been reviewed by this Court, Justice Cardozo wrote that if the ITC "was under a duty to give a hearing similar to one in court, it was bound to expose everything, details as well as summaries." *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 321 (1933).

While both the facts and the legal positions of the parties are clear with respect to that basic issue, the opposition briefs raise two peripheral arguments. First, they contend that DuPont substantiated its wholesale designations of confidentiality and that petitioners are precluded from contesting that because they failed to follow paragraph 10 of the ITC "protective order".² As a fallback position, they assert that petitioners failed to demonstrate prejudice and therefore any denial of due process is not reversible error (ITC Br. 19 n.19; DuPont Br. 10). Both these contentions are factually inaccurate.³ They are also legally unfounded. Petitioners should not in any event have been required to prove that access to the evidence withheld from them (even if confidential) was "absolutely necessary", as both the ITC and the CAFC insisted (Pet. 20a, 42a; *compare* ITC Br. 15). Nor are they required to prove that the result below would have been different if they had known the evidence against them.⁴

2 The ITC also claims that "petitioners agreed to the protective order without qualification" (ITC Br. 13). The order was issued *sua sponte* by the ALJ two days prior to the commencement of this proceeding, 49 Fed. Reg. 21806 (May 23, 1984). Before Akzo's counsel could even see a copy of the "confidential complaint", to which a response was due in twenty days, they were required to and did agree to respect the protective order—but they never agreed to refrain from challenging the order, and they did challenge it almost immediately (Pet. 16a).

3 Petitioners advised the ALJ that they were prejudiced by their counsel's inability to cross-examine or rebut without assistance from their client (Pet. 54a), and they showed specific prejudice in that regard (JA 21424). Further, *none* (and obviously not all) of the hundreds of thousands of pages of documents DuPont stamped "confidential" was proven to be secret data which, if disclosed, would cause substantial harm to its 100% monopoly position. No ITC rule or order required DuPont to make such a showing (Pet. 34a) and the only witness who testified as to "confidentiality" was asked about only two documents (his testimony is quoted at Pet. 9).

4 "One who has been denied access to information or deprived of the privilege of cross-examination on pertinent matters is not in a position to make an offer of proof as to those matters. Likewise, a reviewing court cannot know what a full hearing might have shown

Paragraph 10 of the "protective order" (Pet. 37a) states that a party who disagrees with a confidential designation should notify and confer with the adversary before raising the issue with the ALJ. In addition to vigorously seeking to modify the order at every stage (Pet. 16 n.20, 16a, 17a), counsel for Akzo wrote to counsel for DuPont on several occasions asking for declassification of specified data, but to no avail. Just prior to the commencement of the hearing, on receiving DuPont's witness statements and other trial exhibits stamped confidential, Akzo again moved to modify the protective order and specified the direct testimony and exhibits that should be declassified (Pet. 47a, 52a-54a). During petitioners' argument that much of the material DuPont had classified "is clearly not confidential" (JA 21371), the following colloquy (taken from the Joint Appendix below) then occurred:

"And so we ask Your Honor to review the material that has been withheld . . . we think we are entitled to have a judicial determination with respect to confidentiality and not simply be bound by DuPont's *ipse dixit* that something is confidential." (JA 21371)

Judge Luckern refused, saying:

"We have that problem, the judges have that problem all the time, and . . . I find it difficult to just read it through and say, well that is obviously non-confidential, because there are so many intricacies, and there are things that go on that we may not know about . . . And I have seen some instances where I just feel that it is going overboard, but I really have nothing to challenge them

and for that reason is not free to speculate as to the prejudice involved in such an erroneous ruling." *Powhatan Mining Co. v. Ickes*, 118 F.2d 105, 110 (6th Cir. 1941).

See also *Chapman v. California*, 386 U.S. 18, 23 (1967) ("there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error"); *Grimm v. Brown*, 291 F. Supp. 1011, 1014 (N.D. Cal. 1968), *aff'd*, 449 F.2d 654 (9th Cir. 1971) (citing other cases and noting the "continuing vitality" of *Powhatan Mining*).

with that. And because of the Commission policy with respect to confidentiality, I let it go by. So that is my problem with what you are suggesting for me to do. I can read it through, but I would have reluctance saying, well, I think this is non-confidential." (JA 21371-72)

Mr. Gribbon, lead counsel for DuPont, then commented:

"Yesterday, in response to an informal suggestion from Commission counsel, I went to respondents and I said look, *we won't force you to go through the procedure that is set up in the protective order to declassify.*

"I said, tell me what you want and I will see whether we are able to give it to you. Immediately they said, what we want are those forecasts. . . . *I concluded rapidly that there was no possibility of negotiation. . . . I think Your Honor is quite right that what is confidential here is very much within the determination of the company involved.*" (JA 21373, emphasis added)

As the above record demonstrates, DuPont's claims of confidentiality were never scrutinized or substantiated, nor was there any question about Akzo's compliance with paragraph 10.

The petition (pp. 16 *et seq.*) showed that the ITC's hearing procedures have never been countenanced in any federal court or in any other agency (although that may change if the decision below is allowed to stand). Yet the opposition briefs argue that excluding a party from his own trial is perfectly proper provided his counsel is allowed to attend and to hear the evidence; they even assert this is a device "frequently" used in federal courts (ITC Br. 26, 16; DuPont Br. 3). To support this extraordinary proposition, respondents cite a number of decisions which are actually to the contrary.

Both respondents rely heavily on *Helminski v. Ayerst Laboratories*, 766 F.2d 208 (6th Cir.), *cert. denied*, 106 S.Ct. 386 (1985), to support their "trial by proxy" argument (ITC Br. 18-

19 n.18, DuPont Br. 12 n.17).⁵ That case was brought by the parents of an autistic child, who “was completely unable to comprehend the proceedings” and “could not aid his attorney in any meaningful way” (766 F.2d at 218). Defendant claimed that his presence would prejudice the jury, and the boy was excluded from the liability phase of the trial. On plaintiffs’ appeal, the court held:

“[A]bsent disruptive behavior, involuntary exclusion of a party who is able to comprehend the proceedings and aid counsel would constitute a denial of due process since exclusion of such a party would deny him the right to obtain a fair trial.” (766 F.2d at 216-17)

Although the autistic child could do neither, and both his parents were present throughout to assist counsel, the court held the exclusion improper, but refused to reverse on that ground.

With similar significance, respondents invoke *Doe v. District of Columbia*, 697 F.2d 1115, 1119 (D.C. Cir. 1983), which reversed a jury verdict because a pre-trial discovery protective order prohibited defense counsel from disclosing to their cli-

⁵ The ITC also uses *Helmski* to support its “no prejudice” claim (ITC Br. 19 n.19), for which DuPont is content to cite the opinion below’s argument that Akzo could have offered its own evidence without knowing DuPont’s (DuPont Br. 7, citing Pet. 21a; *but see* Pet. 15). The only other ITC citation for this is *Wirtz v. Baldor Electric Co.*, 337 F.2d 518 (D.C. Cir. 1963), which held that the Government in an agency proceeding “has an option: it can hold back confidential material, and take the risk of not being able to prove its case, or it can produce the material and allow it to be the subject of direct and cross-examination” (337 F.2d at 528).

In arguing “no prejudice”, respondents make much of the irrelevancy that 90 secretaries, clerks, and others assisting the four law firms representing the four respondents acknowledged the protective order so that they could have access to DuPont’s 350,000 documents (DuPont Br. n.1) promptly if the need arose. (DuPont alone, with two law firms, had 90 signatories to deal with fewer documents from Akzo.) This only demonstrates the complexity of the case and counsel’s great need to have the assistance of their clients, the *only* experts in the aramid fiber business.

ents (prison guards) certain information so as to protect the plaintiff prisoners from bodily harm; and *Greene v. McElroy*, 360 U.S. 474, 496-97 (1959), holding that a party affected by agency action has a personal right to confront the witnesses and to know the evidence against him.

Respondents' other authorities, to the extent they have any relevance, have already been dealt with (Pet. 18-20). In brief, they point up the crucial distinction between the investigation or pre-trial stage and "the adjudication stage [where] very different considerations apply"; *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982), *cert. denied*, 460 U.S. 1051 (1983), which *sua sponte* reversed the sealing of confidential evidence and ordered it made public.

Finally, faced with a total absence of judicial support, respondents attempt to defend the ITC's massive denial of due process on the basis of the need for speed and the alleged uniqueness of the issues in ITC proceedings (ITC Br. 14; DuPont Br. 7). In preliminary injunction and other proceedings, federal courts are regularly faced with expedited hearings involving competitors and proof of future injury based on even more confidential business data—and they regularly conduct them with even greater dispatch than the ITC without depriving the parties of their rights.⁶ On the contrary, the very sort of business data withheld here is routinely disclosed and even made public. Thus this "administrative convenience" excuse for departing from due process cannot stand scrutiny.

⁶ Tender offer challenges (involving highly confidential business data and complex legal claims) are often litigated to conclusion within the twenty day period required for tender offers. *E.g.*, in *Gulf & Western Industries, Inc. v. Great Atlantic & Pacific Tea Co.*, 476 F.2d 687 (2d Cir. 1973), the district court supervised discovery, held an evidentiary hearing and issued a detailed 21-page opinion enjoining the tender offer eight days after the complaint was filed; it was affirmed by the court of appeals a month later.

II. ARTICLE III POWERS

While respondents do not dispute that DuPont orchestrated the proceedings before the ITC (Pet. 23), they nevertheless insist that essentially public rights were involved. Both briefs rely on the CAFC's mischaracterization of the proceedings below as a Government *investigation* (Pet. 28a; ITC Br. 21 n.21; DuPont Br. 14 n.20), citing *Young Engineers, Inc. v. United States International Trade Commission*, 721 F.2d 1305 (Fed. Cir. 1983). That decision states: "The 1975 amendment of [Section 337] . . . reflects a recognition that essentially private rights are being enforced in the [Section 337] proceeding" (721 F.2d at 1315). Furthermore, while ITC patent rulings may not have *res judicata* effect in the technical sense, (a) they do bar imports and adversely affect private rights with finality, and (b) the ITC's determinations are *res judicata* as to all non-patent issues in subsequent court proceedings. *Union Manufacturing Co. v. Han Baek Trading Co.*, 763 F.2d 42, 45-46 (2d Cir. 1985).⁷

⁷ Congress can easily devise a statute that would protect domestic patentholders without running afoul of Article III. One such solution (already passed by the House and awaiting Senate action) is to give district courts jurisdiction over claims based on infringement of U.S. process patents abroad (H.R. 3, 100th Cong., 1st Sess. (Omnibus Trade & International Policy Reform Act)). A court finding of patent validity and infringement would then result in an injunction directed against the defendant. If U.S. industry were threatened by imports from other manufacturers who were not defendants, an application could be made to the ITC for an *in rem* order running against all foreign manufacturers (as its present orders do). The President's right to veto the ITC order (but not the district court injunction) would remain intact and would not violate any constitutional principle.

III. TREATY RIGHTS

On March 20, 1987, the Commission of the European Communities ("EC") initiated a procedure under the General Agreement on Tariffs and Trade ("GATT") alleging that the ITC's application of Section 337, as exemplified by its treatment of Akzo, constituted discrimination in violation of Article III(4) of the GATT. 52 Antitrust & Trade Reg. Rep. (BNA) 656-57 (April 2, 1987). On the basis of its own investigation, and after consulting independent U.S. law experts, the EC found that "the Community producer does not enjoy the same opportunity for defending himself before the ITC as he would in a normal American court."⁸

Respondents elide the fact that both treaties require that foreign producers *and* their products be accorded national treatment. Since Section 337 applies only to "*imported goods*" (ITC Br. 27 n.25), the question of whether there is discrimination cannot possibly depend on "whether petitioners were accorded the same rights as domestic firms *in a Section 337 investigation*" (ITC Br. 2, emphasis in original in both quotes; *see also* DuPont Br. 17). Inasmuch as domestic products are subject to infringement claims only in district courts, the proper test is whether, in Section 337 proceedings, foreign respondents and their products receive treatment as favorable as that accorded those accused of infringement or unfair practices in district courts. They clearly do not.

⁸ The EC also stated that a prior GATT panel's decision in *United States—Imports of Certain Automotive Spring Assemblies*, GATT BISD, 30th Supp. at 107 (May 26, 1983) (Pet. 29 n. 33), is not controlling. As recognized by the ITC (ITC Br. 28), that decision did not find Section 337 "exempt from GATT" (DuPont Br. 17 n.26), but only that it was "necessary" in the circumstances of that particular case—a decision not affirmed on review by the GATT Council (Pet. 29 n.33).

CONCLUSION

The writ of certiorari should be issued as prayed.

Respectfully submitted,

DENIS MCINERNEY*

DAVID R. HYDE

LAURENCE T. SORKIN

CAHILL GORDON & REINDEL

80 Pine Street

New York, New York 10005

(212) 701-3000

**Counsel of Record
for Petitioners*

Of Counsel:

C. FREDERICK LEYDIG

LEYDIG, VOIT & MAYER

One IBM Plaza, Suite 4600

Chicago, Illinois 60611

